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No. 10531

United States
Circuit Court of Appeals
For the Ninth Circuit.

Vol
2353

INVESTMENT AND SECURITIES COMPANY,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington

Northern Division

FILED

SEP 24 1943

PAUL P. O'BRIEN,
CLERK

No. 10531

United States
Circuit Court of Appeals
For the Ninth Circuit.

INVESTMENT AND SECURITIES COMPANY,
a corporation,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

WITHERSPOON, WITHERSPOON &
KELLEY,

Peyton Building, Spokane, Washington
Attorneys for Investment and Securities
Company, a corporation,—Intervening
Plaintiff.

THOMAS A. E. LALLY,

Paulsen Building, Spokane, Washington
Attorney for Charles P. Robbins, Share-
holders' Agent of The Shareholders of
the Exchange National Bank of Spo-
kane, Washington, — Cross-Defendant
and Interpleader

EDWARD M. CONNELLY,

United States Attorney,

HARVEY ERICKSON,

Assistant United States Attorney,
Federal Building, Spokane, Washington
Attorneys for Frank J. Kuhl, Collector of
Internal Revenue for Wisconsin,—De-
fendant, and
United States of America—Additional In-
tervenor

In the United States District Court for the Eastern
District of Washington, Northern Division

No. 235

In Equity

CHARLES P. ROBBINS, Shareholders' Agent
for the Shareholders of Exchange National
Bank of Spokane, Washington, an insolvent
national banking association,

Complainant.

COMPLAINT FOR INTERVENTION

Comes now complainant, Charles P. Robbins, and
respectfully shows the Court:

I.

That at all times herein mentioned he was and
now is the duly elected, qualified and acting Share-
holders' Agent of the shareholders of Exchange Na-
tional Bank of Spokane, Washington, an insolvent
national banking association, and a resident of the
above district;

That during said times Judson G. Rosebush, a
resident of the State of Wisconsin, was and now
is a shareholder in said association;

That Investment and Securities Company is a
corporation organized under the laws of the State
of Washington, with its principal place of business
in and a resident of Spokane, Washington.

II.

That your complainant is indebted to the said
Judson G. Rosebush, on account of dividends pay-

able to shareholders, in the sum of Four Thousand Two Hundred and Fifty Dollars (\$4250.00), with possible additional sums payable to him hereafter.

III.

That said Investment and Securities Company has served written notice on your complainant that the said Judson G. Rosebush has assigned to it by written assignment all moneys payable to him from your complainant and said corporation has demanded that your complainant pay said sum to it and has threatened to sue your complainant if he does not do so. [1*]

IV.

That E. J. Koelzer, Assistant United States Attorney at Milwaukee, Wisconsin, has had the United States Marshal for the Eastern District of Washington, Northern Division, serve on your complainant, on December 1, 1941, an alleged Fieri Facias, allegedly issued by the Clerk of the United States District Court for the Eastern District of Wisconsin under date of November 27, 1941, and which commands the said Marshal to levy upon the "goods and chattels, lands and tenements" in his district of the said Judson G. Rosebush on account of an alleged debt of \$37,220.85;

That said Writ of Fieri Facias does not allege the exact nature of the said debt, but your complainant is informed it is due the United States by reason of unpaid income tax.

*Page numbering appearing at foot of page of original certified Transcript of Record.

V.

That your complainant herewith deposits into the registry of this Court the said sum of Four Thousand Two Hundred and Fifty Dollars (\$4250.00) to be disposed of by the order or decree of this court.

VI.

That if complainant pays said sum to any one of said parties, he is informed and believes, and on information and belief alleges that he will be sued by the other party or parties.

VII.

That the sum of Two Hundred and Fifty Dollars (\$250.00) is a reasonable sum to be allowed complainant, as attorney fee together with his costs from said parties and from said sum herein.

Wherefore, your complainant prays the Court for an order of injunction enjoining the said Investment and Securities Company and enjoining the United States Attorney and his deputies at Milwaukee, Wisconsin from instituting any suit or legal proceedings in any court against your complainant to recover said \$4250.00, except permitting them to appear herein and plead for cause of action therefor; [2]

That process issue herein under the direction of this Court, directed to the said Investment and Securities Company and to the said United States Marshal returnable at such time as the Court may determine, that a hearing be had thereafter on the causes of action and facts to be pleaded by the said

parties and that thereupon the Court make said injunction permanent and relieve this complainant from further liability as to the payment of said \$4250.00 and any other sums that may be hereafter payable to the said Judson G. Rosebush, and that complainant be awarded reasonable attorney's fees and his costs herein.

THOS. A. E. LALLY

Attorney for Complainant

1123 Paulsen Building

Spokane, Washington

State of Washington,
County of Spokane—ss.

Charles P. Robbins, being first duly sworn, upon oath deposes and says:

That he is the Shareholders' Agent named in the foregoing petition and complaint; that he has read the same, knows the contents thereof, and the same is true as he verily believes.

(Notarial Seal)

CHARLES P. ROBBINS

Subscribed and sworn to before me this 2nd day of December, 1941.

THOS. A. E. LALLY

Notary Public in and for the State of Washington,
residing at Spokane.

[Endorsed]: Filed Dec 2 1941. [3]

[Title of Court and Cause.]

SPECIAL APPEARANCE AND PLEA TO
QUASH FOR LACK OF JURISDICTION

Comes now the United States of America by Lyle Keith, United States Attorney for the Eastern District of Washington, and Harvey Erickson, Assistant United States Attorney for said district, appearing herein specially, for the purpose of this motion only and for no other purpose, and moves the Court to quash the proceedings as to the United States of America for the following reasons, to-wit:

(1) The filing of the suit in the Eastern District of Washington by Charles P. Robbins, Shareholders' Agent for the Shareholders of Exchange National Bank of Spokane, Washington, an insolvent national banking association, constitutes an unwarranted and improper interference with the jurisdiction and processes of the United States Court for the District of Wisconsin, which, having issued the writ of execution, is entitled to determine whether or not it has reached the funds in question held by the said Charles P. Robbins, Shareholders' Agent for the Shareholders of Exchange National Bank of Spokane, Washington, an insolvent national banking association.

(2) The United States Marshal at Spokane must make his return to the United States District Court for the District of Wisconsin at Milwaukee, showing that he has attached the fund of 4250.00; therefore the jurisdiction of the subject matter of this litigation is in the United States District Court for the District of Wisconsin to determine the alleged

and conflicting claims to the fund, and the United States District Court of the District of Wisconsin has jurisdiction to settle the rights of all parties.

(3) The United States District Court for the Eastern District of Washington does not have jurisdiction over the United States Attorney and his assistants in the District of Wisconsin, and the United States District Court for the Eastern District of Wash- [4] ington is entirely without jurisdiction to entertain proceedings before it or grant any relief therein by way of attorney's fees, costs, or otherwise incurred in the above-entitled proceeding.

Therefore the United States District Court for the Eastern District of Washington, Northern Division, cannot and should not take further cognizance of the said action.

LYLE KEITH

United States Attorney

HARVEY ERICKSON

Assistant United States
Attorney

Service Accepted and Copy Received this 10th
day of February, 1942.

THOS. A. E. LALLY

Atty. for C.P.R.

[Endorsed]: Filed Feb 10 1942. [5]

[Title of Court and Cause.]

ORDER DENYING MOTION TO QUASH

Motion of United States of America by Lyle

Keith, United States Attorney for the Eastern District of Washington, and Harvey Erickson, Assistant United States Attorney for said District, having been made by way of Special Appearance and to quash the proceedings for lack of jurisdiction, and the Court being advised in the premises,

It Is Hereby Ordered That said Motion be and it is hereby denied.

Dated this 2nd day of April, 1942.

L. B. SCHWELLENBACH
Judge

Presented by

W. V. KELLEY

Approved as to form

HARVEY ERICKSON
Asst. U. S. Atty.

[Endorsed]: Filed Apr 2 1942. [6]

[Title of Court and Cause.]

MOTION TO FILE COMPLAINT IN INTER-
VENTION AND PETITION FOR DEC-
LARATORY RELIEF

Investment and Securities Co., a corporation organized under the Laws of the State of Washington, with its principal place of business in and a resident of Spokane, Washington, moves for leave to file a Complaint in Intervention and Petition for Declaratory Relief in this action, in order to

assert its claims and title to property and moneys as set forth in its proposed Complaint, of which a copy is hereto attached, on the ground that it is the owner of said property and moneys in excess of \$4250.00 deposited by Charles P. Robbins, Shareholders' Agent for Shareholders of Exchange National Bank of Spokane, Washington, an insolvent national banking association, with the Clerk of this Court, and which the Collector of Internal Revenue for Wisconsin has wrongfully attempted to seize by the service on said Robbins on December 1, 1941, of an alleged Fieri Facies allegedly issued by the Clerk of the United States District Court for the Eastern District of Wisconsin, under date of November 27, 1941, which commands the United States Marshall for the Eastern District of Washington, Northern Division, to levy upon said property and moneys on account of an alleged debt of \$37,230.85 allegedly owing to said Collector by one Judson G. Rosebush, a citizen of Wisconsin, and as such owner of said properties and moneys has a claim of superior right, title and interest to the property on which is sought to be levied the alleged tax lien against said Judson G. Rosebush presenting questions of law and of fact which are common and germane to the main action.

WITHERSPOON, WITHER-
SPOON & KELLEY

By W. V. KELLEY

Attorneys for Investment and
Securities Co.

[Endorsed]: Filed Mar 9 1942. [7]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division

No. 235

INVESTMENT AND SECURITIES CO., a cor-
poration,

vs.

CHARLES P. ROBBINS, Shareholders' Agent
for Shareholders of Exchange National Bank
of Spokane, Washington,

Cross-defendant,

and

FRANK J. KUHL, Collector of Internal Revenue
for Wisconsin,

Defendant.

ORDER FOR INTERVENTION

Complaint in Intervention and Petition for Declaratory Relief of Investment and Securities Co., a corporation, having been presented to the above entitled Court, and leave asked to file the same as its Complaint in Intervention and Petition for Declaratory Relief herein, and it appearing that good cause exists therefor.

It Is Hereby Ordered That leave be and it is hereby granted to file said Complaint in Intervention and Petition for Declaratory Relief and that Investment and Securities Co., a corporation, be permitted to intervene in the above entitled action.

It Is Further Ordered That Page 2, paragraph

VI, line 6 of said paragraph, may be amended by interlineation through the substitution of the word "Wisconsin" for the word "Washington" as alleged so that the amended line 6 of said paragraph shall read "District Court for the Eastern District of Wisconsin".

Dated this 2nd day of April, 1942.

L. B. SCHWELLENBACH
Judge

Presented by W. V. Kelley.

Approved as to form

HARVEY ERICKSON
Asst. U. S. Atty.

[Endorsed]: Filed Apr 2 1942. [8]

[Title of Court and Cause.]

COMPLAINT IN INTERVENTION AND PETITION FOR DECLARATORY RELIEF

Comes now complainant and petitioner, Investment and Securities Co., and respectively shows the Court:

I.

That at all times herein mentioned it was and now is a corporation organized and existing under and by virtue of the Laws of the State of Washington and has paid its annual state corporation fee last due and has its principal place of business in and is a resident of Spokane, Washington.

II.

That during said times, cross-defendant, Charles P. Robbins was and now is the duly elected, qualified and acting Shareholders' Agent of the Shareholders of Exchange National Bank of Spokane, Washington, an insolvent national banking association and is also a resident of the above district.

III.

That during said times one Judson G. Rosebush, a resident of the State of Wisconsin, was and now is a shareholder of the Exchange National Bank of Spokane, Washington, an insolvent national banking association.

IV.

That defendant, Frank J. Kuhl, is the Collector of Internal Revenue for Wisconsin and as such is an officer of the United States of America.

V.

That said Exchange National Bank of Spokane is indebted to the said Judson G. Rosebush on account of dividends payable to shareholders in the sum of \$4,250.00 with possible additional sums payable to said Rosebush hereafter.

VI.

That defendant, Frank J. Kuhl, as Collector of Internal Revenue for Wisconsin, has procured through the United States Marshal [9] for the Eastern District of Washington, Northern Division, service on said cross defendant Charles P. Robbins on December 1, 1941, of an alleged Fieri

Facies allegedly issued by the Clerk of the United States District Court for Eastern District of Wisconsin, under date of November 27, 1941, which commands the said Marshall to levy upon certain "goods and chattels, lands and tenements" in his district of the said Judson G. Rosebush on account of an alleged debt of \$37,220.85 which your complainant is informed is due the United States by reason of unpaid income tax.

VII.

That your complainant and petitioner does not challenge the validity of any tax imposition on said Judson G. Rosebush by said defendant Collector of Internal Revenue for Wisconsin.

VIII.

That at the time said Exchange National Bank of Spokane failed on January 18, 1929, said Judson G. Rosebush was the owner of 250 shares of the capital stock of said Bank; that by reason thereof said Judson Rosebush paid to the Receiver of said Bank assessments on said stock totalling \$25,000.00, which payments were made as follows:

October 5, 1929	\$ 5,000.00
December 12, 1929	5,000.00
February 3, 1930	5,000.00
June 2, 1930	10,000.00
March 25, 1931 interest on de-	
ferred payments	\$1,590.20;

That subsequently cross defendant, Charles P. Robbins, as Shareholders' Agent of said Bank, has paid certain liquidating dividends to other shareholders

who paid their super added liability but that he has withheld payments owing to said Judson G. Rosebush and that the payments to which said Rosebush was entitled are as follows:

July 5, 1940	7%	\$1,750.00
December 20, 1940	4%	1,000.00
November 10, 1941	6%	1,500.00

that your complainant and petitioner is informed and believes and therefore alleges it to be a fact that a further and final liquidating dividend of said Bank will be made during the year 1942. [10]

IX.

That on July 27, 1937, said Judson G. Rosebush assigned to complainant and petitioner, Investment and Securities Co., for a good and valuable consideration, any recovery which might be made by him or on his behalf on account of the assessment paid by him on stock of said Exchange National Bank of Spokane; that said Assignment was contained in a written Agreement, the pertinent part of which reads as follows:

“The party of the second part further agrees to and does hereby assign to party of the first part as security to the balance of indebtedness owing by the party of the second part to party of the first part any recovery which may be made by or on behalf of party of the second part from or on account of an assessment paid on stock of Exchange National Bank, Spokane, Washington, and further agrees to make, execute and deliver to party of the first part any

further instruments or documents necessary, needful and proper to make this assignment for collateral purposes effective and to enable party of the first part to recover any amounts which may or shall be due by reason of the payment of such assessments on said Exchange National Bank stock. It is understood that the Collector of Internal Revenue has filed an Order of Distrainment against party of the second part and that this assignment is subsequent and junior to any lien against said recovery that said Collector of Internal Revenue may have acquired by virtue of such Order of Distrainment.”

X.

That said Assignment was served upon said cross-defendant, Charles P. Robbins, by your complainant and petitioner on March 14, 1938; that said Charles P. Robbins has withheld the above payments mentioned in paragraph 8 because of the statement contained in the assignment reading as follows:

“It is understood that the Collector of Internal Revenue has filed an Order of Distrainment against the party of the second part and that this assignment is subsequent and junior to any lien against said recovery that said Collector of Internal Revenue may have acquired by virtue of such order of Distrainment.”

XI.

That neither said defendant, Collector of Internal Revenue for Wisconsin nor the United States of

America established any tax lien against said Judson G. Rosebush as taxpayer with respect to said moneys and property in the custody of said cross-defendant, [11] Charles P. Robbins, prior to said assignment; that there was not any Notice of any tax lien filed in any proper office prior to said assignment referred to in paragraph IX within the meaning of Section 3672 of the Internal Revenue Code of the United States of America (substantially corresponding to Section 3186(b), Revised Statutes as amended by section 613(a) of the 1928 Revenue Act and Act of June 25, 1936, 26 U.S.C.A. §1562) which provides that:

“Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) In accordance with the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice; or

(2) In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law provided for the filing of such notice, * * *.”

XII.

That the alleged Fieri Facies issued on December 1, 1941, referred to in Paragraph VI, is subsequent to the said assignment on July 27, 1937 to your

complainant and was issued after a suit was brought upon a tax claim against said Judson G. Rosebush in the Federal District Court for the Eastern District of Wisconsin in an action entitled "United States vs. Judson G. Rosebush, etal.", #5079 Civil Docket, resulting in a judgment being entered against said Judson G. Rosebush; that your complainant is informed and believes and therefore alleges it to be a fact that neither the defendant, Collector of Internal Revenue for Wisconsin, nor the United States by its Complaint in said action sought to impress a lien on the right, title and interest of said Judson G. Rosebush to any property or claim arising out of the assessment paid by him on the said Exchange National Bank Stock. That prior to December 1, 1941 no Notice of Tax Lien was filed either with the Clerk of the Federal District Court for the Eastern District of Washington or the County Auditor of Spokane County, Washington.

XIII.

That complainant and petitioner is informed and believes that [12] cross defendant Charles P. Robbins will declare additional dividends in the near future; that said Charles P. Robbins has deposited into the registry of this court the sum of \$4250.00 to be disposed of by the order or decree of this court; that your complaint Investment and Securities Co., is entitled to said sum of \$4,250.00 and any further additional dividends to be declared by said Charles P. Robbins to be deposited in the registry of this Court.

XIV.

That by reason of the conflicting claims of the defendant, Collector of Internal Revenue for Wisconsin, and your complainant and petitioner to said sum of 4,250.00 and to any additional dividends to be declared by said defendant, Charles P. Robbins, an actual controversy exists as to the title of said property within the meaning of the Federal Declaratory Judgment Act, U. S. Judicial Code Section 274(d), (U.S.C.A. Title 28, Section 400); that a declaratory judgment should be entered by this Court which will clarify and settle the legal relations of the parties and terminate said controversy and afford relief from the insecurity and uncertainty arising from such controversy.

Wherefore, your complainant and petitioner prays:

1. For an Order declaring complainant and petitioner the owner of said sum of 4,250.00 deposited in the registry of this Court and as such is entitled to receive same and any additional liquidating dividends to be declared and paid to or on account of said Judson G. Rosebush as a shareholder of the Exchange National Bank of Spokane who has paid his super added liability, and that cross defendant Charles P. Robbins be ordered to make such payments to your complainant and petitioner, Investment and Securities Co., and that any levy or alleged levy made upon said sum of \$4,250.00 or said additional dividends be dissolved and that the same be declared to be the property of your complainant.

2. That cross defendant Charles P. Robbins be

enjoined and restrained from paying said sum of \$4,250.00 or any additional dividend to any one other than your complainant and petitioner or [13] its lawful assigns, and defendant Collector of Internal Revenue for Wisconsin be enjoined and restrained from Making any further levy upon said \$4,250.00 or upon any additional liquidating dividends to be declared by said Robbins and that the Clerk of this Court be directed to pay said sum of \$4,250.00 to your complainant and petitioner, and that complainant and petitioner be awarded his costs herein and all equitable relief meet and proper in the premises.

WITHERSPOON, WITHER-
SPOON & KELLEY

By W. V. KELLEY

Attorneys for Investment and
Securities Co.

State of Washington,
County of Spokane—ss.

George L. Kimmel, being first duly sworn on oath, deposes and says:

That he is Vice President of Investment and Securities Co., complainant and petitioner in the above and foregoing complaint in intervention and petition for declaratory relief, that he has read said complaint and petition, knows the contents thereof and believes the same to be true.

GEORGE L. KIMMEL

Subscribed and sworn to before me this 9th day of March, 1942.

[Seal] W. V. KELLEY

Notary Public in and for the State of Washington,
residing at Spokane.

[Endorsed]: Filed Apr 2 1942. [14]

[Title of Court and Cause.]

ANSWER OF DEFENDANT, FRANK J. KUHL,
COLLECTOR OF INTERNAL REVENUE
FOR WISCONSIN

For ansyer to the complaint in intervention and petition for declaratory relief filed herein by Investment and Securities Company, a corporation, the defendant, Frank J. Kuhl, Collector of Internal Revenue for Wisconsin, by his attorneys, alleges and denies as follows:

1. Admits the allegations of paragraphs I, II and III of said complaint and alleges further that said Judson G. Rosebush is and was a resident of the City of Appleton, Outagamie County, in the State of Wisconsin, at all times since the year 1928, and for a long time prior thereto.

2. Admits only so much of paragraph IV as alleges that this defendant is the Collector of Internal Revenue for Wisconsin. Further answering, defendant alleges he first assumed the duties of his office on June 2, 1941.

3. Admits the allegations of paragraph V, save

that the United States has a prior claim to said dividends by virtue of a tax lien and/or an agreement dated July 27, 1937 made for its benefit by said Rosebush and complainant Investment and Securities Company.

4. Denies the allegations of paragraph VI, except that he admits that Judson G. Rosebush is indebted to the United States for federal income taxes due for the calendar year 1928 for which the United States obtained a judgment and duly issued execution and attachment or garnishment thereon with respect to certain funds now held by cross-defendant Charles P. Robbins.

5. Answering paragraph VII, defendant denies the inference that he imposed a tax upon Judson G. Rosebush. The tax for which the United States obtained the judgment referred to in the immediately preceding paragraph was duly and lawfully assessed by the Commissioner of Internal Revenue.

6. Defendant admits the allegations of paragraph VIII, except that said dividends are payable to the United States for the reasons set forth above in paragraph 3 hereof. [15]

7. The allegations of paragraph IX are denied, except that defendant alleges, upon information and belief, that a certain written agreement dated July 27, 1937 was entered into between the Investment and Securities Company and said Judson G. Rosebush concerning the assessment paid by him on the stock owned by him in the Exchange National Bank of Spokane. Further answering, defendant alleges that if in procuring the agreement the said Invest-

ment and Securities Company believed it could thereby acquire a claim prior to the then existing tax lien of the United States, of which it expressly was put on notice, or had knowledge prior to July 27, 1937, then this defendant alleges said Investment and Securities Company, and its officers or representatives, procured the same by wrongful acts, conduct and representations to said Rosebush who was led to believe and intended that the signing by him of such an agreement could have no greater effect than to assign to said Investment and Securities Company his interest in said fund effective only if and when his said 1928 tax liability was fully paid; that said agreement of July 27, 1937 was drawn by attorneys for the Investment and Securities Company which knew Rosebush was without the advice of counsel in the premises and did not intend to prefer it as against the United States. Defendant further states that said alleged assignment does not correctly recite the facts of which the Investment and Securities Company had knowledge or of which it was put on notice, upon the basis of which the tax lien arose, that is to say, the tax lien did not arise merely by virtue of an order for distraint (the agreement incorrectly states "Order of Distraint", it became effective upon February 18, 1934 upon receipt of the assessment list by the Collector of Internal Revenue. Notice of said lien was also filed with the Register of Deeds at Appleton, Wisconsin, and with the Clerk of the United States District Court at Milwaukee, Wisconsin, during

April, 1934; that a warrant for distraint was also issued in April, 1934; that the signature of said Rosebush to said agreement was induced and procured in bad faith on the part of the Investment and Securities Company; that it was obtained under [16] pressure exercised against said Rosebush by threats to finally dispose of certain of his assets and enforce payment of certain claims asserted against him; that the Investment and Securities Company wrongfully induced said Rosebush to refrain from submitting the agreement to the Internal Revenue officials before execution thereof; that if this Court should assume jurisdiction hereof and hold that under the meaning of the language of the alleged assignment the rights of the United States are intended to be inferior to those of the Investment and Securities Company, in the absence of the filing and recording of notices of lien at Spokane prior to July 27, 1937, the defendant then prays that this Court hold the assignment to be null and void as against the United States in view of the above allegations, or in the alternative, reform the agreement to give effect to the intent of said Rosebush by making it subsequent and junior to the tax lien of the United States which became effective on February 18, 1934, or, in any event, not later than in April, 1934.

Further answering, defendant alleges that said agreement of July 27, 1937 constitutes a contract for the benefit of the United States as a third party beneficiary or should be so construed under all of the attending circumstances.

8. Answering paragraph X, defendant states that long after the execution of said assignment a copy was served upon said Charles P. Robbins by the Investment and Securities Company but denies the remaining allegations of paragraph X. Further answering, defendant states that said Robbins withheld the payments referred to in paragraph X because of the receipt of a letter from Judson G. Rosebush to said Robbins dated Appleton, Wisconsin, June 16, 1940, wherein said Rosebush advised Robbins that he had steadily maintained with the Investment and Securities Company the position that the assignment of his dividend rights in the Exchange National Bank stock was valueless until and unless the prior claim of the Government had been satisfied and that that still was his position.

9. Answering paragraph XI, defendant states that the United [17] States duly established the tax lien with respect to all assets of said Judson G. Rosebush under Section 3186 of the Revised Statutes as amended by Section 613 of the Revenue Act of 1928, and Section 509 of the Revenue Act of 1934; that said lien became effective as of the date of the receipt of the assessment list by the Collector of Internal Revenue at Milwaukee on or about February 18, 1934; that notices of lien were duly filed in April, 1934 with the Register of Deeds at Appleton, Wisconsin, and with the Clerk of the United States District Court at Milwaukee, Wisconsin, covering the unpaid 1928 tax assessment; that said Rosebush held in his own possession at Appleton, Wisconsin, at all times since February

1, 1934, the stock certificates issued in his name by the Exchange National Bank of Spokane, Washington, for 250 shares; that said stock certificates still are in the possession of said Rosebush at Appleton, Wisconsin; that said stock and all rights arising in connection therewith, including any dividends payable on the assessments paid thereon to the bank receiver, became and still are subject to the aforesaid tax lien of the United States; that said shares and any increments or rights arising therefrom have their situs for the purpose of the federal tax lien at the domicile of said Rosebush in Wisconsin where notices of the tax lien, if any notices were necessary as against third persons, were duly filed in April, 1934.

Except as admitted, qualified or explained, the allegations of paragraph XI are denied.

10. Answering paragraph XII, defendant alleges that a writ of fieri facias issued out of the United States District Court for the Eastern District of Wisconsin on November 27, 1941 with respect to the \$37,220.85 judgment against Rosebush for 1928 taxes, plus interest, and that the writ was duly served by the United States Marshal upon said Charles P. Robbins; that garnishment also was issued in connection with said judgment under date of March 20, 1942, directed to Charles P. Robbins and was duly served upon him; that Civil Action #5079, entitled "United States v. Judson G. Rosebush, et al." was filed December 14, 1935 in the United States District Court for the Eastern [18] District of Wisconsin, and resulted in the

aforesaid judgment against Rosebush but the court retained jurisdiction to enter such further judgments, orders or decrees to which the United States may be entitled; that in said action the original bill of complaint was amended in December, 1939 making Mrs. Rosebush a party defendant thereto and seeking discovery, accounting, etc. and to enforce the tax lien of the United States against all properties or rights to property belonging to said Rosebush to which the tax lien theretofore had attached; that as a result of said complaint, as amended, the United States discovered that Judson G. Rosebush still held certificates representing 250 shares of stock of the Exchange National Bank on which assessments had been paid by him; that he had on October 7, 1935 undertaken to transfer his said rights in said stock and the assessment paid thereon to his wife but the transfer was held to be ineffective as against the lien of the United States. Defendant admits that no notice of tax lien was filed with the Clerk of the District Court for the Eastern District of Washington or with the County Auditor of Spokane County prior to December 1, 1941. Except as thus admitted, qualified or explained, each and every of the allegations of paragraph XII are denied.

11. Answering paragraph XIII, defendant denies that the Investment and Securities Company is entitled to the said sum of \$4,250 or any further additional dividends that may be declared by said Robbins. The remaining allegations of paragraph XIII are admitted.

12. Answering paragraph XIV, defendant alleges that any controversy or conflict of claims with respect to the fund of \$4,250 and additional dividends to be declared by said Robbins exists not between this defendant and the complainant but between the United States of America and said Investment and Securities Company. Defendant further states that said controversy is with respect to federal taxes and by reason thereof this Court is without jurisdiction to render a declaratory judgment as prayed by complainant.

Wherefore, this defendant prays:

1. That the complaint and petition herein of the complainant Investment and Securities Company be dismissed; [19]

2. For such other, further, general and equitable relief as to the Court may seem meet and proper, or as prayed in paragraph 7 hereof with respect to the alleged assignment.

Comes now the defendant, Frank J. Kuhl, Collector of Internal Revenue for the District of Wisconsin, in answer to the complaint and answer of cross-defendant Charles P. Robbins, Shareholders' Agent, and alleges and denies as follows in regard to cross-defendant's plea for affirmative relief:

1. That the allegations of paragraph I are admitted to be true.

2. That the allegations of paragraph II are admitted to be true.

3. That the allegations of paragraph III are admitted to be true, except it is alleged that the

assignment by said Rosebush to the Investment and Securities Company is junior and subsequent to the right of the United States to said moneys for the reasons set forth above in answer to the complaint and petition of the Investment and Securities Company.

4. Answering paragraph IV, it is admitted that a fieri facias was served on cross-defendant, Charles P. Robbins, on December 1, 1941, by the United States Marshal for the Eastern District of Washington and that said fieri facias was issued by the Clerk of the United States District Court for the Eastern District of Wisconsin, under date of November 27, 1941, on account of a judgment obtained by the United States for unpaid income taxes and interest in the amount of \$37,220.85. Except as above admitted, each of the allegations of paragraph IV is denied.

5. That the allegations of paragraph V are admitted to be true.

6. That the allegations of paragraph VI are denied for the reason that the defendant does not have sufficient information to form a belief.

7. That the allegations of paragraph VII are denied for the reason that the defendant does not have sufficient information to form a belief. Further answering, defendant alleges that no costs whatsoever should be allowed against said fund of \$4,250 deposited in the registry of this Court. [20]

8. Upon information and belief, defendant is willing to admit the allegations of paragraph VIII.

9. That the allegations of paragraph IX are

denied for the reason that defendant does not have sufficient information to form a belief.

10. That the allegations of paragraph X are denied.

11. That the allegations of paragraph XI are admitted.

12. The allegations of paragraph XII are denied for the reason that the defendant does not have sufficient information to form a belief.

AFFIRMATIVE DEFENSE

For a further, separate and distinct defense, the defendant, Frank J. Kuhl, Collector of Internal Revenue for the Eastern District of Wisconsin alleges that this Court is without jurisdiction over his person and that the United States of America is the real party in interest and that this defendant has no right, title or interest in this said action, instituted in the Eastern District of Washington.

Wherefore, this defendant prays that he be dismissed as a defendant in the above-entitled action instituted in this Court and for such other, general and further relief as to the Court may seem just and equitable.

EDWARD M. CONNELLY

United States Attorney.

HARVEY ERICKSON

Assistant U. S. Attorney.

Copy received this 13th day of July, 1942.

THOS. A. E. LALLY

Attorney for Cross-Defendant

WITHERSPOON, WITHER-
SPOON & KELLEY

Attorneys for Plaintiff.

[Endorsed]: Filed Jul 14 1942. [21]

[Title of Court and Cause.]

ANSWER OF CROSS-DEFENDANT CHARLES
P. ROBBINS, SHAREHOLDERS' AGENT

Comes now the above-named Cross-Defendant, Charles P. Robbins, Shareholders' Agent for Shareholders of Exchange National Bank of Spokane, Washington, and in answer to the Complaint in Intervention of Investment and Securities Co., alleges and denies as follows in regard to said complaint and petition for declaratory relief of said Investment and Securities Co:

I.

Admits paragraph I.

II.

Admits paragraph II.

III.

Admits paragraph III.

IV.

Admits paragraph IV.

V.

In answer to paragraph V, this cross-defendant denies each and every allegation, matter and thing therein contained except that he has had in his possession as such shareholders' agent the sum of \$4250.00, which ordinarily was payable to the said Judson G. Rosebush, and admits that possibly additional sums may be payable to the said Rosebush hereafter from this answering cross-defendant, and which sums are payable because of stock assessments paid by the said Rosebush on shares of stock that he owned in the said Exchange National Bank of Spokane, an insolvent National Banking Association at the time it was declared insolvent by the Comptroller of the Currency in 1929.

VI.

Admits paragraph VI if the word "Washington" in the sixth line thereof is stricken and the word "Wisconsin" is inserted in place thereof, and this answering cross-defendant further alleges herein that thereafter under date of March 2, 1942 an alleged writ of garnishment was issued by the Clerk of the District Court of the United States of America for the Eastern District of Wisconsin in a suit therein in which the United States of America was plaintiff, the said Judson G. Rosebush defendant, and this answering defendant was garnishee defendant, by which writ this answering cross-defendant was ordered to answer what if any moneys or property he had belonging to said Judson G. Rosebush. [22]

VII.

Admits paragraph VII.

VIII.

Admits paragraph VIII.

IX.

Admits paragraph IX.

X.

Admits paragraph X.

XI.

Answering paragraph XI this cross-defendant has not sufficient knowledge and information regarding the matters therein set out to admit the same, and therefore denies each and every allegation, matter and thing therein contained.

XII.

Admits paragraph XII.

XIII.

Answering paragraph XIII, this answering cross-defendant admits that it has deposited into the registry of this Court the said sum of \$4250.00 and that he will probably have an additional sum of money payable to the said Judson G. Rosebush; that except as herein expressly admitted, this answering cross-defendant denies each and every other allegation, matter and thing contained in said paragraph XIII.

XIV.

Admits paragraph XIV.

THIS ANSWERING CROSS-DEFENDANT,
CHARLES P. ROBBINS, AS SHARE-
HOLDERS' AGENT FOR SHAREHOLD-
ERS OF EXCHANGE NATIONAL BANK
OF SPOKANE, FURTHER PLEADS FOR
THE FOLLOWING RELIEF HEREIN:

I.

That at all dates herein mentioned he was and now is the duly elected, qualified and acting Shareholders' Agent of the shareholders of the Exchange National Bank of Spokane, an insolvent national banking association, and is a resident of Spokane, Washington;

That during said times, Investment and Securities Co. was and now is a corporation organized under the laws of the State of Washington with its [23] principal place of business in Spokane, Washington;

That during said times Judson G. Rosebush was and now is a resident of the State of Wisconsin and a shareholder of said association;

That heretofore in the month of December, 1941, this pleading defendant commenced the above-entitled cause in equity by filing a complaint in intervention in which the following paragraphs numbered II, III, IV, V, VI, and VII were set out, and in which this pleading defendant asked for relief, including the relief herein set out, which

paragraphs are again pleaded herein and wherein this cross-defendant is referred to as "complainant".

II.

That your complainant is indebted to the said Judson G. Rosebush, on account of dividends payable to shareholders, in the sum of Four Thousand Two Hundred and Fifty Dollars (\$4250.00), with possible additional sums payable to him hereafter.

III.

That said Investment and Securities Company has served written notice on your complainant that the said Judson G. Rosebush has assigned to it by written assignment all moneys payable to him from your complainant and said corporation has demanded that your complainant pay said sum to it and has threatened to sue your complainant if he does not do so.

IV.

That E. J. Koelzer, Assistant United States Attorney at Milwaukee, Wisconsin, has had the United States Marshal for the Eastern District of Washington, Northern Division, serve on your complainant, on December 1, 1941, an alleged Fieri Facias, allegedly issued by the Clerk of the United States District Court for the Eastern District of Wisconsin under date of November 27, 1941, and which commands the said Marshal to levy upon the "goods and chattels, lands and tenements" in his district of the said Judson G. Rosebush on account of an alleged debt of \$37,220.85;

That said Writ of Fieri Facias does not allege the exact nature of the said debt, but your complainant is informed it is due the United States by reason of unpaid income tax.

V.

That your complainant herewith deposits into the registry of this [24] Court the said sum of Four Thousand Two Hundred and Fifty Dollars (\$4250.00) to be disposed of by the order or decree of this court.

VI.

That if complainant pays said sum to any one of said parties he is informed and believes, and on information and belief alleges that he will be sued by the other party or parties.

VII.

That the sum of Two Hundred and Fifty Dollars (\$250.00) is a reasonable sum to be allowed complainant as attorney's fees, together with his costs from said parties and from said sum herein.

VIII.

That after the filing of the said Complaint for Intervention there was served on this pleading defendant an alleged writ of garnishment issued under date of March 2, 1942 by and out of the United States District Court for the Eastern District of Wisconsin, in which cause the United States of America is plaintiff, Judson G. Rosebush defendant, and this pleading defendant is garnishee de-

fendant, ordering this pleading defendant to answer within twenty (20) days of the date of service what if any properties or moneys this pleading defendant has or then had belonging to said Rosebush.

IX.

That because of the Writ of Fieri Facias mentioned in Paragraph VI of the complaint of said Investment and Securities Co. and because of the said writ of garnishment this pleading defendant has been obliged to employ lawyers in the City of Milwaukee, Wisconsin to act as his attorneys because of said writs in said suit in that jurisdiction and will incur attorney's fees in an amount he cannot at this time determine.

X.

That because of the additional facts pleaded herein in addition to what was pleaded in the said complaint for intervention, this pleading defendant now alleges that the sum of Five Hundred Dollars (\$500.00) is a reasonable sum to be allowed this pleading defendant as attorney's fees herein from the United States of America, from Investment and Securities Co. and from the said sum of \$4250.00.

[25]

XI.

That on filing said Complaint for Intervention in this court in December, 1941, this pleading defendant surrendered into the registry of the court said sum of \$4250.00, praying that the Court determine to whom the same shall be paid.

XII.

That this pleading defendant has at all times been able, ready and willing to pay said sum to the person or litigant entitled thereto, but does not wish to have a judgment entered against him herein ordering him to pay it to one person and have the said court in Wisconsin order him to pay it to another.

Wherefore this pleading defendant prays the court for an order and decree decreeing to whom said money and any other money that may come into his possession as such Shareholders' Agent and ordinarily paid to the said Judson G. Rosebush shall be paid; that said decree shall also save this pleading defendant harmless from an order or decree of any other court in respect to said moneys and adverse to the order and decree of this court; that this pleading defendant shall be allowed attorney's fees in the sum of Five Hundred Dollars (\$500.00) and his costs and disbursements.

THOS. A. E. LALLY

Attorney for Charles P. Robbins,
Shareholders' Agent
for Shareholders of Exchange
National Bank of
Spokane, Washington

State of Washington
County of Spokane—ss.

Charles P. Robbins, being first duly sworn, upon oath deposes and says:

That he is the cross-defendant named in the foregoing answer; that he has read the same, knows the contents thereof and that the same is true as he verily believes.

CHARLES P. ROBBINS

Subscribed and sworn to before me this 23rd day of April, 1942.

(Notarial Seal) THOS. A. E. LALLY

Notary Public in and for the State of Washington,
residing at Spokane

SUMMONS WAIVED

Received copy hereof this 23 day of April, 1942

WITHERSPOON, WITHER-
SPOON & KELLEY

Attorney for Investment and
Securities Co. [26]

Received copy hereof this..... day of April, 1942

Attorney for United States of
America, at.....

[Endorsed]: Filed Apr 23 1942. [27]

In the District Court of the United States for the
Eastern District of Washington Northern
Division

No. 235

INVESTMENT AND SECURITIES COMPANY,
a corporation,

Plaintiff,

v.

CHARLES P. ROBBINS, Shareholders' Agent for
Shareholders of Exchange National Bank of
Spokane, Washington,

Cross-Defendant,

FRANK J. KUHL, Collector of Internal Revenue
for Wisconsin,

Defendant,

UNITED STATES OF AMERICA,
Applicant for Intervention

ORDER FOR INTERVENTION

The Court having read the motion to intervene and being fully advised in the premises, and it appearing to the Court that the United States of America is a proper party to said action and has an interest in said action; therefore, it is

Ordered and Decreed that the United States of America shall be allowed to intervene in said action and file its answer in intervention.

Done in open Court this 14th day of July, 1942.

L. B. SCHWELLENBACH

United States District Judge.

Presented by

HARVEY ERICKSON

Assistant United States

Attorney

Approved by

THOS. A. E. LALLY

Attorney for Cross-Defendant

WITHERSPOON WITHER-

SPOON & KELLEY

Attorneys for Plaintiff

[Endorsed]: Filed Jul 14 1942 [28]

[Title of Court and Cause]

ANSWER IN INTERVENTION

(United States of America)

Comes now the United States of America by Edward M. Connelly, United States Attorney for the Eastern District of Washington, and Harvey Erickson, Assistant United States Attorney for said District, and by virtue of authority of the Attorney General of the United States, and under his direction, claim and assert that the United States of America has a right, title and interest to the moneys deposited with the Clerk of the Federal Court and in the hands of Charles P. Robbins, Shareholders' Agent, Exchange National Bank of Spokane, and allege as follows:

I.

That the United States of America made an assessment for the calendar year 1928 against Judson G. Rosebush in the Revenue Collection District of Wisconsin in the year 1934 in the amount of \$37,220.85 for income taxes. That immediately thereafter notices of the tax lien of the United States against Judson G. Rosebush were recorded with the Clerk of the United States District Court for the Eastern District of Wisconsin at Milwaukee and with the Register of Deeds for Outagamie County, Wisconsin. That said notices of tax lien were recorded prior to the assignment later referred to of the cross-defendant Charles P. Robbins, Shareholders' Agent, to the complainant Investment and Securities Company.

II.

That during the year 1937 the United States brought an action in the District Court for the Eastern District of Wisconsin against Judson G. Rosebush, a resident of Appleton, Wisconsin.

III.

That on November 26, 1941, a judgment was entered in the Eastern District of Wisconsin against Judson G. Rosebush in the sum of \$37,220.85 plus costs, and a copy of said judgment is attached hereto, incorporated herein by reference and referred to as Exhibit A.

IV.

That on November 27, 1941, the United States Attorney for the Eastern District of Wisconsin caused

a writ of execution to issue [29] against the properties of Judson G. Rosebush, which writ was served upon the Investment and Securities Company of Spokane in the Eastern District of Washington, on December 1, 1941. That on December 1, 1941, when said writ of execution was served upon the Investment and Securities Company, the said Investment and Securities Company had the sum of \$4,250.00 in its possession owing to the said Judson G. Rosebush.

V.

That the federal tax lien which attached against the said Judson G. Rosebush in the sum of \$37,220.85 during the year 1934 attached as a lien upon all moneys and property then in the hands of the said Judson G. Rosebush, or any property or moneys subsequently coming into his possession in any part of the United States.

VI.

That on July 27, 1937, Judson G. Rosebush and the Investment and Securities Company, complainant herein, made and entered into an agreement referred to as Exhibit B, attached hereto, and made a part hereof by reference, whereby the said Judson G. Rosebush assigned all his right, title and interest to the Investment and Securities Company, of certain moneys due the said Judson G. Rosebush by Charles P. Robbins, Shareholders' Agent of the Exchange National Bank of Spokane, to the Investment and Securities Company, subject to the claims and the lien of the United States by virtue of income tax assessments.

VII.

That the United States by virtue of the receipt of the collection list by the Collector of Internal Revenue for the District of Wisconsin and the assignment above referred to, and actual notice of the claim of the United States by the complainant Investment and Securities Company, has the prior right, title and interest to any funds now in the hands of the said cross-defendant, Charles P. Robbins, or deposited with the Clerk of the Federal Court by the said Charles P. Robbins, or coming into the hands of the said Charles P. Robbins in the future as a result of the liquidation of the Exchange National Bank of Spokane, Washington.

Wherefore, your Intervenor prays: [30]

1. That it be adjudged and have the prior right, title and interest to all sums of money now in the possession of the said Charles P. Robbins, Shareholders' Agent of the Exchange National Bank of Spokane, Washington, or deposited with the Clerk of the Federal Court for the Eastern District of Washington, by the said Charles P. Robbins, and of all sums coming into the possession of the said Charles P. Robbins in the future owing to the said Judson G. Rosebush as a result of the liquidation of the Exchange National Bank of Spokane, Washington.

2. That the claim of the United States be adjudged prior and superior to the claim of all other parties to said action, and that the United States recover its costs and disbursements herein, and that

the United States have such other and further relief as to the Court may seem just and equitable.

EDWARD M. CONNELLY

United States Attorney

HARVEY ERICKSON

Assistant United States

Attorney

Copy received this 13th day of July, 1942.

THOS. A. E. LALLY

Attorney for Cross-Defendant

WITHERSPOON WITHER-

SPOON & KELLEY

Attorneys for Plaintiff [31]

EXHIBIT A

In the District Court of the United States of America
for the Eastern District of Wisconsin

No. 5079

Civil Docket

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JUDSON G. ROSEBUSH; APPLETON WIRE
WORKS, INC., a corporation; PATTEN
PAPER CO., a corporation; BANK OF KAU-
KAUNA, a corporation; FIRST NATIONAL
BANK, Appleton, Wisconsin, a corporation;
NORTHWESTERN NATIONAL BANK,
FIRST NATIONAL BANK, Chicago, Illinois,
and BARBARA J. MCNAUGHTON ROSE-
BUSH,

Defendants.

JUDGMENT

The motion of the-plaintiff for judgment by default against the above-named defendant, Judson G. Rosebush, having come on to be heard before this Court on the 17th day of June, 1940, and the Court having ordered judgment in favor of the plaintiff and against said defendant, Judson G. Rosebush, for the relief prayed for in the plaintiff's complaint, as amended; and it appearing by affidavit on file herein that the said defendant Judson G. Rosebush is not now nor has he during any time during the

pendency of this action been in the military or naval service of the United States, nor a member of the reserve of the land or naval forces of the United States in active duty; and upon the written stipulation filed herein on the 6th day of January, 1941, agreeing to the dismissal of the above-entitled action without costs as against the defendants Appleton Wire Works, Inc., a corporation, Patten Paper Co., a corporation; Bank of Kaukauna, a corporation; First National Bank, Appleton, Wisconsin, a corporation; Northwestern National Bank, First National Bank, Chicago, Illinois.

It Is Ordered and Adjudged that the plaintiff, United States of America, do have and recover of the defendant, Judson G. Rosebush, the sum of Twenty-four Thousand Four Hundred Forty-one and 67/100 Dollars (\$24,441.67), principal and Twelve Thousand Seven Hundred Seventy-Nine and 18/100 Dollars (\$12,779.18), [32] interest, making a total sum of Thirty-seven Thousand Two Hundred Twenty and 85/100 Dollars (\$37,220.85); and that the plaintiff have execution therefor.

It Is Further Ordered and Adjudged that the above-entitled action be and the same hereby is dismissed upon the merits thereof, without costs as to the defendants Appleton Wire Works, Inc., a corporation, Patten Paper Co., a corporation, Bank of Kaukauna, a corporation, First National Bank, Appleton, Wisconsin, a corporation, Northwestern National Bank and First National Bank, Chicago, Illinois.

It Is Further Ordered and Adjudged that this Court hereby expressly retains jurisdiction over this cause and the defendants Judson G. Rosebush and Barbara J. McNaughton Rosebush for the purpose of making all appropriate orders, judgments or decrees to which the plaintiff, United States of America, may be entitled under the prayers of the complaint, as amended, including discovery, accounting or receivership, as well as such other orders as may be necessary to give effect to this judgment and decree.

F. RYAN DUFFY

District Judge

Dated at Milwaukee, Wisconsin this 26th day of November, 1941.

(Endorsements)

In the District Court of the United States for the
Eastern District of Wisconsin.

Civil Docket 5079

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JUDSON G. ROSEBUSH: APPLETON WIRE
WORKS, INC., a corporation; PATTEN
PAPER CO., a corporation; BANK OF
KAUKAUNA, a corporation; FIRST NA-
TIONAL BANK, Appleton, Wisconsin, [33]
a corporation; NORTHWESTERN NA-
TIONAL BANK, FIRST NATIONAL
BANK, Chicago, Illinois, and BARBARA J.
MC NAUGHTON ROSEBUSH,

Defendants.

JUDGMENT

U. S. Dist. Court; East. Dist. of Wis. Filed Nov.
26, 1941 B. H. Westfahl, Clerk.

Certified Copy

D. C. Form No. 30

United States of America,

Eastern District of Wisconsin—ss:

I, B. H. Westfahl, Clerk of the United States Dis-
trict Court in and for the Eastern District of Wis-
consin, do hereby certify that the annexed and fore-
going is a true and full copy of the original Judg-
ment, filed Nov. 26, 1941, in the case of United States
of America vs. Judson G. Rosebush; et al, Civil

Docket No. 5079 now remaining among the records of said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Milwaukee, Wis. this 9th day of January, A. D. 1942.

(Seal)

B. H. WESTFAHL, Clerk.

(Endorsements)

United States District Court Eastern District
of Wisconsin

UNITED STATES OF AMERICA,

vs.

JUDSON G. ROSEBUSH; APPLETON WIRE
WORKS, INC., a corporation; PATTEN
PAPER CO., a corporation; BANK OF KAU-
KAUNA, a corporation; FIRST NATIONAL
BANK, Appleton, Wis., a corporation;
NORTHWESTERN NATIONAL BANK,
FIRST NATIONAL BANK, Chicago, Illinois,
and BARBARA J. MC NAUGHTON ROSE-
BUSH

Certified Copy [34]

EXHIBIT B

AGREEMENT

This agreement, made and entered into at Spo-
kane, Washington, this 27th day of July, 1937, by
and between Investment and Securities Co., a Wash-

ington corporation, of Spokane, Washington, party of the first part, hereinafter for convenience sometimes referred to as the "Company", and Judson G. Rosebush, of Appleton, Wisconsin, party of the second part, hereinafter for convenience sometimes referred to as the "Pledgor",

WITNESSETH:

Whereas, the party of the second part is indebted to the party of the first part on his two certain promissory Notes, as follows:

Note dated November 30, 1932, in the principal amount of Twenty-five Thousand Dollars (\$25,000.00), with interest thereon at six per cent (6%) from date,

upon which there was collateral pledged as follows:

325 shares of Nekoosa-Edwards Paper Company common;

600 shares of Northern Paper Mills common.

Note dated December 19, 1932, in the principal amount of Seventy-five Thousand Dollars (\$75,000.00), with interest thereon at six per cent (6%) from date,

upon which there was collateral pledged as follows:

750 shares of Northern Paper Mills common;

820 shares of Inland Empire Paper Company, common, (original issue);

and,

Whereas, under date of April 7, 1936, notice by registered mail was given by the Company to the

Pledgor that unless the aforesaid indebtedness was paid on or before April 22, 1936, the Company would sell at private sale at their office all of the collateral securing the said indebtedness; and the indebtedness not having been paid on the date set for sale, a sale was held and no other bidders appearing the securities held as collateral were bid in by the Company and applied against the indebtedness of the party of the second part, as follows:

Applied to Note in the principal amount of Twenty-five Thousand Dollars (\$25,000.00), dated November 30, 1932, the proceeds of:

325 shares of Nekoosa-Edwards Paper Company common stock at \$30.00 per share,....	\$ 9,750.00
600 shares of Northern Paper Mills common stock at \$10.00 per share.....	6,000.00

Total credited to above Note,.....\$15,750.00

Applied on Note in the principal amount of Seventy-five Thousand Dollars (\$75,000.00), dated December 19, 1932, the proceeds of:

750 shares of Northern Paper Mills common stock at \$10.00 per share,.....	\$ 7,500.00
820 shares of Inland Empire Paper Company common at	1.00

Total credited to above Note,.....\$ 7,501.00

and,

Whereas, in arranging to secure stock powers from the Pledgor for the transfer of new Inland Empire Paper Company stock issued in lieu of the old common stock it became apparent that the Pledgor questioned the validity of the sale of 820 shares of Inland Empire Paper Company common stock for the sum of One Dollar (\$1.00), and as the Company is not desirous of working any undue

hardship upon the Pledgor and to that end is willing to afford the Pledgor certain opportunities to reacquire said stock, in consideration for which the Pledgor is willing to assign to the Company as security to the balance of his indebtedness any recovery which may be made on the assessment paid on stock of the Exchange National Bank, Spokane, Washington:

Now, therefore, in consideration of the premises and the mutual covenants hereinafter contained, the parties hereto agree as follows:

The party of the second part agrees to and does hereby ratify, confirm and approve the sale made April 22, 1936, by Investment and Securities Co. to itself of the shares of stock held as collateral security to the obligations of the Pledgor, at the prices named and the application of the proceeds thereof, as follows: [36]

Applied on Note in the principal amount of Twenty-five Thousand Dollars (\$25,000.00), dated November 30, 1932, the proceeds of:

325 shares of Nekoosa-Edwards Paper Com-	
pany common stock at \$30.00 per share,....	\$ 9,750.00
600 shares of Northern Paper Mills common	
stock at \$10.00 per share,.....	6,000.00

Total credited to above Note,.....	\$15,750.00
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Applied on Note in the principal amount of Seventy-five Thousand Dollars (\$75,000.00), dated December 19, 1932, the proceeds of:

750 shares of Northern Paper Mills common	
stock at \$10.00 per share,.....	\$ 7,500.00
820 shares of Inland Empire Paper Com-	
pany common at	1.00

Total credited to above Note,	\$ 7,501.00
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The party of the second part further agrees to and does hereby assign to party of the first part as security to the balance of indebtedness owing by the party of the second part to party of the first part any recovery which may be made by or on behalf of party of the second part from or on account of an assessment paid on stock of Exchange National Bank, Spokane, Washington, and further agrees to make, execute and deliver to party of the first part any further instruments or documents necessary, needful and proper to make this assignment for collateral purposes effective and to enable party of the first part to recover any amounts which may or shall be due by reason of the payment of such assessments on said Exchange National Bank stock. It is understood that the Collector of Internal Revenue has filed an Order of Distrainment against party of the second part and that this assignment is subsequent and junior to any lien against said recovery that said Collector of Internal Revenue may have acquired by virtue of such Order of Distrainment.

In consideration of the foregoing, the party of the first part agrees that no sale of all or any part of said 820 shares of Inland Empire Paper Company common stock shall be made before April 1, 1938, unless consented to by party of the second part; that if any sale of said stock shall be made subsequent to April 1, 1938, and prior to April 1, 1939, [37] the party of the first part will give and grant unto party of the second part an opportunity to purchase all or any part of said 820 shares of Inland Empire Paper Company stock

at the price at which party of the first part shall contemplate selling it, and that party of the second part shall have a five day period in which to elect to purchase or not to purchase all or any part of said stock, during which five day period the party of the first part will not sell the stock to anyone else. Said five day period shall begin with the date and time of depositing a letter, full first class air mail postage prepaid, in the United States mails, addressed to the last known address of party of the second part, and it is expressly understood that if party of the second part shall decide to accept the offer of sale so given by the Company he will at once communicate his acceptance by telegram or telephone to the Company and will forward bank draft or cashier's check in full payment thereof at once, so that said bank draft or cashier's check shall be in the hands of the Company not later than five days after the expiration of the first five day period during which the offer shall be accepted. Following the expiration of said first five day period, if said offer shall not be accepted, or the expiration of five days *days* thereafter, if said offer shall be accepted but payment shall not be received within said last five day period, the Company shall be under no further duty to withhold said stock from the market and may sell said stock free and discharged of any of the terms and provisions of this Agreement.

It is understood and agreed that the party of the first part has pledged or will pledge to the Reconstruction Finance Corporation 418 of the 820 shares

of the Inland Empire Paper Company stock in accordance with the reorganization plan of the Inland Empire Paper Company. This pledge is for the purpose of vesting in the Reconstruction Finance Corporation voting rights to the said stock so pledged, which pledge shall continue until the indebtedness of the Inland Empire Paper Company to the Reconstruction Finance Corporation is paid in full or until the proxy and assignment is [38] released by the Reconstruction Finance Corporation, or its successor in interest, and it is further understood and agreed that any sale of the stock of the Inland Empire Paper Company, either to the said party of the second part or to others, during the terms of this pledge and proxy, shall be made subject to the terms and conditions of the pledge and proxy.

It is further understood and agreed that in the event of the sale of all or any part of said 820 shares of Inland Empire Paper Company common stock on or before April 1, 1939, the Company will credit upon the indebtedness of the party of the second part the excess of the sale price of all or any part of said stock over the One Dollar (\$1.00) price at which the said stock was bid in by the Company.

It is further agreed that if the Company shall sell either the Nekoosa-Edwards Paper Company common stock or the Northern Paper Mills common stock before April 1, 1938, the Company will credit party of the second part on his notes with any amount received by the Company for such stock in excess of the amount at which the Company bid said stock in at the sale aforesaid.

Time is expressly declared to be of the essence of each and all of the terms and provisions hereof.

This agreement shall inure to the benefit of and shall be binding upon the successors and assigns of the party of the first part and upon the heirs, executors, administrators, legal representatives and assigns of the party of the second part.

In Witness Whereof, the party of the first part has caused its corporate signature and seal to be hereunto affixed by its proper officers duly authorized, and the party of the second part has hereunto affixed his hand and seal, the day and year first above written.

INVESTMENT AND SECURITIES CO.,

By L. A. STILSON
Vice President.

Attest:

GEO. L. KIMMEL
Secretary.

Party of the First Part.

[Seal] JUDSON G. ROSEBUSH
Party of the Second Part.

[39]

State of Washington
County of Spokane—ss.

On this 10th day of September, 1937, before me personally appeared L. A. Stilson and Geo. L. Kimmel, to me known to be the Vice President and Secretary, respectively, of Investment and Securities Co., the corporation that executed the within and foregoing instrument, and acknowledged the said

instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

E. R. ERICKSON

Notary Public in and for the
State of Washington, residing
at Spokane.

State of Wisconsin
County of Outagamie—ss.

I, the undersigned, a Notary Public in and for the State of Wisconsin, do hereby certify that on this 27th day of July, 1937, personally appeared before me Judson G. Rosebush, to me known to be the individual described in and who executed the within and foregoing instrument and acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal the day and year first above written.

M. KRONSCHNABEL

Notary Public in and for the
State of Wisconsin, residing
at Appleton. My commission
expires Aug. 20, 1939.

[Endorsed]: Filed July 14 1942. [40]

[Title of Court and Cause.]

REPLY OF CHARLES P. ROBBINS, SHARE-
HOLDERS AGENT, TO ANSWER OF
UNITED STATES OF AMERICA

Comes now Charles P. Robbins, Shareholders Agent of the *Sah*eholders of The Exchange National Bank of Spokane, Washington and in reply to the answer of the United States of America, admits, alleges and denies said answer as follows:

—1—

Has not sufficient knowledge as to the allegations of paragraph I to form a belief as to the correctness thereof and therefore denies the same.

—2—

Denies paragraph—II—thereof.

—3—

Denies paragraph III thereof.

—4—

Has not sufficient knowledge as to the allegations of paragraph IV to form a belief and therefore denies the same.

—5—

Denies each and every allegation in paragraph V thereof.

—6—

Answering paragraph VI, this pleader has been informed that such facts therein pleaded, took place,

but has no personal knowledge thereof and therefore denies the same.

—VII—

Denies each and every allegation matter and thing contained in paragraph VII thereof

Wherefore this cross defendant prays, for the relief sought in his original petition filed herein; that the Court determine to whom he shall pay the money he has deposited in this Court and the money that he may hereafter have payable to the said Judson G. Rosebush; that he be awarded the attorney fee therein sought and his costs and disbursements.

THOS. A. E. LALLY

Attorney for the said Chas. P.
Robbins, Shareholders Agent.

[41]

State of Washington

County of Spokane—ss.

Charles P. Robbins being first duly sworn upon oath deposes and says that he is the above named shareholders agent and cross-defendant; that he has read the foregoing reply, knows the contents thereof and the same is true as he verily believes.

CHARLES P. ROBBINS

Shareholders Agent of the
Shareholders of The Ex-
change National Bank of Spo-
kane, Wash.

Subscribed and sworn to before me this 20th day
of July 1942.

[Seal]

THOS. A. E. LALLY

Notary Public.

Received copy hereof This 21 day of July 1942.

WITHERSPOON WITHER-
SPOON & KELLEY

Attorneys for Investment &
Securities Co.

EDWARD M. CONNELLY

HARVEY ERICKSON

Attorneys for U.S.A.

[Endorsed]: Filed Jul 20 1942 [42]

[Title of Court and Cause.]

MOTION TO STRIKE

Complainant and petitioner move the Court to strike from the Answer in Intervention of United States of America, Applicant for Intervention, paragraph V thereof.

WITHERSPOON WITHER-
SPOON & KELLEY

By W. V. KELLEY

Attorneys for Complainant
and Petitioner.

Copy received this 21st day of July, 1942.

THOS. A. E. LALLY,

Attorneys for C. P. Robbins

Copy received this 21st day of July, 1942.

EDWARD M. CONNELLY

Attorneys for Kuhl & United
States

[Endorsed]: Filed July 21 1942. [43]

[Title of Court and Cause.]

MOTION TO MAKE MORE DEFINITE AND
CERTAIN OR FOR A BILL OF PARTICULARS

Comes now the complainant and petitioner and moves the Court for an Order requiring United States of America, Applicant for Intervention, to make its Answer in Intervention more definite and certain as follows:

I.

As to paragraph IV by stating the date and by whom an alleged writ of execution was served upon the Investment and Securities Co., and by furnishing a copy of return of service.

If the foregoing motion is denied, but not otherwise, the complainant and petitioner moves the Court to require the Applicant for Intervention herein to furnish the information sought by Bill of Particulars.

This Motion is based upon the records and files herein and upon the affidavit of W. V. Kelley, one of the attorneys for complainant and petitioner.

WITHERSPOON, WITHER-
SPOON & KELLEY.

By W. V. KELLEY,

Attorneys for Complainant
and Petitioner.

State of Washington,
County of Spokane—ss.

W. V. Kelley, being first duly sworn on oath, deposes and says:

That he is one of the attorneys for the complainant and petitioner and makes this affidavit in support of the foregoing Motion to Make More Definite and Certain or for Bill of Particulars; that the information requested is necessary for the proper preparation of complainant and petitioner's case, is not within their knowledge or that of affiant, and that said motion is not made for delay.

W. V. KELLEY.

Subscribed and sworn to before me this 21st day of July, 1942. [44]

[Notarial Seal] WILLIAM G. ENNIS,
Notary Public in and for the State of Washington,
residing at Spokane.

Copy received this 21 day of July, 1942.

THOS. A. E. LALLY,
Attorneys for C. P. Robbins.

Copy received this 21st day of July, 1942.

EDWARD M. CONNELLY,
Attorneys for Kuhl & United
States.

[Endorsed]: Filed Jul. 21, 1942. [45]

[Title of Court and Cause.]

MOTION TO MAKE MORE DEFINITE AND
CERTAIN OR FOR BILL OF PARTICULARS

Comes now the complainant and petitioner and moves the Court for an Order requiring defendant

Frank J. Kuhl, Collector of Internal Revenue for Wisconsin, to make his Answer more definite and certain as follows:

I.

As to paragraph 7 by stating the name of the officer or officers, representative or representatives, who is or are alleged to have procured the agreement of July 27, 1937; by stating what the alleged wrongful acts, conduct and representations consisted of; by stating what were the alleged wrongful acts, conduct and representations and when and where the same are alleged to have been made; by stating what officer or officers, representative or representatives are alleged to have acted in bad faith and what threats were made, by whom and where, so that the said Rosebush was wrongfully induced to refrain from submitting the agreement to the Internal Revenue officials before execution thereof.

II.

As to paragraph 10, by stating how said Rosebush is alleged to have undertaken to transfer his rights in said stock and assessment on October 7, 1935 to his wife; that if said alleged attempted transfer was by virtue of a written instrument, to furnish a copy thereof.

If the foregoing motion is denied, but not otherwise, the complainant and petitioner moves the Court to require the defendant to furnish the information sought by Bill of Particulars.

This Motion is based upon the records and files

herein and upon the affidavit of W. V. Kelley, one of the attorneys for complainant and petitioner.

WITHERSPOON, WITHER-
SPOON & KELLEY.

By W. V. KELLEY,

Attorneys for Complainant
and Petitioner. [46]

State of Washington,
County of Spokane—ss.

W. V. Kelley, being first duly sworn on oath, deposes and says:

That he is one of the attorneys for the complainant and petitioner and makes this affidavit in support of the foregoing Motion to Make More Definite and Certain or for Bill of Particulars; that the information requested is necessary for the proper preparation of complainant and petitioner's case, is not within their knowledge or that of affiant, and that said motion is not made for delay.

W. V. KELLEY.

Subscribed and sworn to before me this 21st day of July, 1942.

[Notarial Seal] WILLIAM G. ENNIS,
Notary Public in and for the State of Washington,
residing at Spokane.

Copy received this 21st day of July, 1942.

THOS. A. E. LALLY,

Attorneys for C. P. Robbins.

Copy received this 21st day of July, 1942.

EDWARD M. CONNELLY,
Attorney for Kuhn & United
States.

[Endorsed]: Filed Jul. 21, 1942. [47]

[Title of Court and Cause.]

MOTION TO STRIKE

Complainant and petitioner moves the Court to strike from the Answer of defendant Frank J. Kuhl, Collector of Internal Revenue for Wisconsin, the following:

I.

From paragraph 7 thereof the words "that said agreement of July 27, 1937 was drawn by attorneys for the Investment and Securities Company which knew Rosebush was without the advice of counsel in the premises and did not intend to prefer it as against the United States".

II.

The second and last sentence of paragraph 8.

III.

From paragraph 10 the following: "that garnishment also was issued in connection with said judgment under date of March 20, 1942, directed to Charles P. Robbins and was duly served upon him".

on the ground that the same are redundant, immaterial and impertinent.

WITHERSPOON, WITHER-
SPOON & KELLEY.

By W. V. KELLEY,
Attorneys for Complainant
and Petitioner.

Copy received this 21st day of July, 1942.

THOS. A. E. LALLY,
Attorneys for C. P. Robbins.

Copy received this 21st day of July, 1942.

EDWARD M. CONNELLY,
Attorneys for Kuhn & United
States.

[Endorsed]: Filed Jul. 21, 1942. [48]

[Title of Court and Cause.]

ORDER DENYING MOTION TO MAKE MORE
DEFINITE AND CERTAIN OR FOR A
BILL OF PARTICULARS

This matter coming on for hearing before the above-entitled Court on this 28th day of August, 1942, and the Investment and Securities Company being represented by William V. Kelley of Witherspoon, Witherspoon and Kelley, its attorneys, and the defendant Charles P. Robbins being represented by Thomas A. E. Lally, and the United States of America being represented by Harvey Erick-

son, Assistant United States Attorney, and the Court being fully advised in the premises,

It Is Ordered, Adjudged and Decreed that the motion of the plaintiff to strike Paragraph five (5) from the answer in intervention of the United States is denied.

It Is Further Ordered that the motion of the plaintiff to make Paragraph four (4) of the answer in intervention of the United States more definite and certain by stating the date upon which the return of execution was served upon the Investment and Securities Company is also denied.

It Is Further Ordered that the pre-trial conference be held at which time the plaintiff's motion to strike and motion to make more definite and certain or for a bill of particulars as to the answer of Frank J. Kuhl, Collector of Internal Revenue for the District of Wisconsin, be considered and that no final action be taken upon said motion at this time.

Dated this 31 day of August, 1942.

L. B. SCHWELLENBACH,

United States District Judge.

Presented by:

HARVEY ERICKSON,

Assistant U. S. Attorney.

Approved as to form:

W. V. KELLEY,

Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 31, 1942. [49]

[Title of Court and Cause.]

NOTICE THAT CHARLES P. ROBBINS,
SHAREHOLDERS AGENT HAS PAID AD-
DITIONAL SUMS INTO THE COURT
REGISTRY

To the above named Plaintiff, Defendant and Ap-
plicant for intervention:

Take notice that the above named Charles P. Robbins, Shareholders Agent for the shareholders of the Exchange National Bank of Spokane, Washington, has this date paid into the registry of the above court the additional sums \$1500.00 and \$750.00 and which sums were ordinarily payable to Judson G. Rosebush and which sums together with the sum of \$4,250.00 heretofore so paid by said Shareholders Agent, are so deposited so that the above Court may determine which of the above parties, Plaintiff, Defendant and Applicant for intervention, shall receive said sums.

Dated this 21st day of July, 1942.

THOS. A. E. LALLY,

Attorney for the above named
Charles P. Robbins, Share-
holders Agent.

EDWARD M. CONNELLY,
HARVEY ERICKSON,

Attorneys for defendant and
applicant.

Received copy hereof this 21st day of July, 1942.

WITHERSPOON, WITHER-
SPOON & KELLEY.

Attorneys for the Plaintiff.

[Endorsed]: Filed Jul. 20, 1942. [50]

[Title of Court and Cause.]

REPLY TO ANSWER OF CROSS DEFEND-
ANT CHARLES P. ROBBINS, SHARE-
HOLDERS' AGENT

Comes now complainant and petitioner Investment and Securities Co., and replying to Answer of Cross-Defendant Charles P. Robbins, Shareholders' Agent, and particularly to Paragraph 10 thereof, denies that complainant and petitioner is liable for or should pay any attorneys fees or expenses incurred by said Cross-Defendant Charles P. Robbins, Shareholders' Agent, in this cause.

Wherefore, Complainant and petitioner prays that Cross-Defendant Charles P. Robbins take nothing by his Answer and affirmative defenses as against complainant and petitioner, and that complainant and petitioner have judgment against said

Cross-Defendant as prayed for, and for its costs and disbursements incurred herein.

WITHERSPOON, WITHER-
SPOON & KELLEY.

By W. V. KELLEY,

Attorneys for Complainant
and Petitioner.

Copy received this 21 day of July, 19.....

THOS A. E. LALLY,

Attorneys for C. P. Robbins.

State of Washington,
County of Spokane—ss.

Geo. L. Kimmel, being first duly sworn, says:
That he is the Vice President of Investment and
Secucities Co., complainant and Petitioner; that he
has read the above and foregoing Reply, knows the
contents thereof and the same are true as he ver-
ily believes.

GEO. L. KIMMEL

Subscribed and sworn to before me this 20th day
of July, 1942.

(Notarial Seal) W. A. SCHMITZ,
Notary Public in and for the State of Washington,
residing at Spokane.

[Endorsed]: Filed Jul. 21, 1942. [51]

[Title of Court and Cause.]

REPLY OF CHARLES P. ROBBINS TO
ANSWER OF FRANK J. KUHL

Comes now the above Cross-Defendant, Charles

P. Robbins, Shareholders agent for the Shareholders of The Exchange National Bank of Spokane, Washington and in Reply to the Answer of Defendant Frank J. Kuhl, Collector of Internal Revenue for Wisconsin, admits, denies and alleges as follows:

—1—

Admits paragraph —1— thereof.

—2—

Admits paragraph —2— thereof.

—3—

Denies paragraph —3— thereof.

—4—

Denies paragraph —4— thereof.

—5—

Denies paragraph —5— thereof.

—6—

Denies paragraph —6— thereof.

—7—

Denies paragraph —7— thereof.

—8—

Denies paragraph —8— thereof except that this answering cross defendant has withheld payment of the money involved.

—9—

Denies paragraph —9— thereof.

—10—

Denies paragraph —10— thereof and each and every allegation, matter and thing therein contained, save that there was an attempted service of an alleged writ of fieri facias shown to but not served on this cross defendant, and admits that an alleged writ of garnishment was issued therein and directed to this cross-defendant and attempted to be served on him, but he specifically denies that either and both of said writs were in fact duly and lawfully served on him and denies [52] that the Court issuing them had jurisdiction of this cross defendant and denies that said Court had jurisdiction or authority to serve them or either of them on this cross defendant.

—11—

Does not have sufficient knowledge, or information as to the matters in paragraph —11— to form a belief and *therefor* denies the same.

—12—

Denies paragraph —12— thereof.

Wherefore Having Replied in Full, this cross defendant prays for the relief and attorney fee as his original pleading and complaint herein prayed for.

THOS. A. E. LALLY,

Attorney for Cross-Defendant.

State of Washington,
County of Spokane—ss.

Charles P. Robbins, being first duly sworn upon oath deposes and says that he is the Shareholders Agent of the Shareholders of the Exchange National Bank of Spokane, Washington, the Cross Defendant above named; that he has read the foregoing reply, knows the contents thereof and the same is true as he verily believes.

CHARLES P. ROBBINS.

Subscribed and sworn to before me this 28th day of July, 1942.

[Notarial Seal] THOS. A. E. LALLY,

Notary Public residing at
Spokane.

Received copy hereof this 28 day of July, 1942.

WITHERSPOON, WITHER-
SPOON & KELLEY.

Attorneys for the Plaintiff.

EDWARD M. CONNELLY,
HARVEY ERICKSON,

Attorneys for defendant and for intervenor, Frank
J. Kuhl, Collector of Internal Revenue for
Wisconsin and United States of America.

[Endorsed]: Filed Jul. 28, 1942. [53]

[Title of Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes now Edward M. Connelly, United States Attorney for the Eastern District of Washington, and Harvey Erickson, Assistant United States Attorney for said District, and move the Court for the entry of Summary Judgment under Court Rule 56B.

This motion is based upon the affidavit of Harvey Erickson hereto attached and upon the files and proceedings herein.

EDWARD M. CONNELLY,

United States Attorney.

HARVEY ERICKSON,

Assistant United States Attorney.

AFFIDAVIT

State of Washington,
County of Spokane—ss.

Harvey Erickson, being first duly sworn, upon oath deposes and says:

That he is Assistant United States Attorney for the Eastern District of Washington;

That the United States District Court for the Eastern District of Wisconsin in Civil Action No. 5079, has already determined that the tax lien of the United States attached as against the property of Judson G. Rosebush on February 18, 1934, upon receipt by the Collector of Internal Revenue of the assessment list for the aforesaid 1928 tax

liability; and the attempted transfer on October 7, 1935, of said stock, and the right to dividends thereon by the said Judson G. Rosebush to the said Barbara J. McNaughton Rosebush was without legal effect;

That on July 27, 1937, the Investment and Securities Company, through its agents, L. A. Stilson, Vice-President, and George L. Kimmel, Secretary, entered into an agreement with Judson G. Rosebush, whereby it was provided that the said Judson G. Rosebush would transfer to the said Investment and Securities Company any recovery that the said Rosebush might receive as a result of payments on stock assessments of the Exchange National Bank of Spokane, Washington. [54]

It was further provided in the agreement that the Collector of Internal Revenue has filed an order of distraint against the said Rosebush and that this assignment of July 27, 1937 is subsequent and junior to any lien against the said recovery that the said Collector of Internal Revenue may have acquired by virtue of such order of distraint. Said agreement is attached to the Answer of the United States in Intervention as Exhibit "B" thereto, and is admitted by counsel for the Investment and Securities Company to be a verbatim copy of the original agreement executed on July 27, 1937, by and between Judson G. Rosebush and the Investment and Securities Company.

HARVEY ERICKSON.

Subscribed and sworn to before me this 18th day of August, 1942.

(Notarial Seal) EDWARD M. CONNELLY,
Notary Public in and for the State of Washington,
residing at Spokane.

Received copy hereof this 18th day of August, 1942.

WITHERSPOON, WITHER-
SPOON & KELLEY.

Attorneys for Complainant in
Intervention, Investment
and Securities Co.

Received copy hereof this 18th day of August, 1942.

THOS. A. E. LALLY,
Attorney for Cross-Defend-
ant.

[Endorsed]: Filed Aug. 18, 1942. [55]

[Title of Court and Cause.]

PETITION TO HAVE SUPPLEMENTAL COM-
PLAINT FILED AND THAT PROCESS
ISSUE TO JUDSON G. ROSEBUSH AND
BARBARA J. McNAUGHTON ROSEBUSH

The above named Interpleader, Charles P. Robbins,
respectfully shows the Court:

—1—

That he has deposited in the registry and with the
clerk of the above entitled Court the sum of

\$6,500.00 which was ordinarily payable by him to Judson G. Rosebush who is and who was a shareholder of The Exchange National Bank of Spokane, Washington, an insolvent national banking association, because of assessments paid by said Rosebush on his liability as such shareholder and because of moneys collected by the said interpleader for the benefit of all of such shareholders who have so paid their said assessments.

—2—

That because said money was claimed by the above named Investment and Securities Co. and by the above named Frank J. Kuhl, as Collector of Internal Revenue for Wisconsin, and because each of them threatened interpleader with suit if he paid any of said money to the other, this interpleader filed his original petition herein, in the form of interpleader and thereafter deposited said sum in said registry, and the said Investment and Securities Co. and the said Collector of Internal Revenue for Wisconsin appeared herein and filed answer and pleadings alleging their respective rights to said money.

—3—

That about August 11th, 1942, interpleader first learned and had first reason to learn, in the taking of the deposition of said Judson G. Rosebush, that he had on October 7th, 1935, transferred or attempted to transfer to his wife Barber J. McNaughton Rosebush some or all of his right, title and interest in and to the said money payable to

him by the said interpleader as a result of the payment of said assessments.

—4—

That ever since said date interpleader has been attempting to have the said Judson G. Rosebush and wife execute a waiver and release of their claim and right, title and interest to said moneys and have had letters pass between them, and their attorneys and interpleader and his attorney; that the said Rosebush and wife never refused to execute such waiver and release until interpleader's attorney on September 26th, 1942, received a letter from the attorneys of the said [56] Rosebush and wife in which they refused to execute such a waiver or release and in which they suggested that said wife be joined as a party to this action.

—5—

That none of the facts regarding the claims of the said Rosebush and wife were known to interpleader at the time of filing his original bill herein and at the time he answered the pleading of the other two said claimants.

—6—

That if the said Rosebush and wife are not made party defendants to this action, and the Court makes disposition of said money, the said Rosebush and wife can and probably will institute suit therefor against this interpleader. Wherefore: This Interpleader Prays that the supplemental petition and complaint he filed with this motion in the above

Court be allowed to remain filed; that sixty day summons issue to each said Rosebush and wife if found out of the State of Washington and twenty day summons if found within said state, ordering them to appear and answer the same.

THOS. A. E. LALLY,

Solicitor for said Inter-
pleader.

State of Washington,
County of Spokane—ss.

Charles P. Robbins, being first duly sworn upon oath, deposes and says that he is the interpleader, petitioner named in the foregoing petition; that he has read the same, knows the contents thereof and the same is true as therein stated as he verily believes.

CHARLES P. ROBBINS,

Subscribed and sworn to before me this 29th day of September, 1942.

[Notarial Seal] THOS. A. E. LALLY,

Notary Public residing in
Spokane.

Received copy hereof this 5 day of October, 1942.

WITHERSPOON, WITHER-
SPOON & KELLEY,

Attorneys for Investment and
Securities Co.

EDWARD M. CONNELLY &
HARVEY ERICKSON,

Attorneys for Frank Kuhl,
Collector.

[Endorsed]: Filed Oct. 5, 1942. [57]

In the United States District Court for the Eastern
District of Washington, Northern Division

Number 235

INVESTMENT AND SECURITIES CO., a cor-
poration,

vs.

CHARLES P. ROBBINS, Shareholders Agent of
the Shareholders of the Exchange National
Bank of Spokane, *and* Insolvent National
Banking Association,

Interpleader and Cross Defendant

vs.

FRANK KUHL, Collector of Internal Revenue for
Wisconsin,

Defendant

vs.

JUDSON G. ROSEBUSH and BARBARA J.
McNAUGHTON ROSEBUSH,

Defendants

ORDER GRANTING PETITION OF CHARLES
P. ROBBINS, SHAREHOLDERS AGENT,
FILING SUPPLEMENTAL COMPLAINT
AND THAT PROCESS ISSUE

This cause coming on for hearing on this date
on the petition of Charles P. Robbins Shareholders
Agent of the *Sahre*holders of Exchange National
Bank, for this order and it appearing from said

petition that Judson G. Rosebush and Barbara J. McNaughton Rosebush his wife are proper and necessary parties to this action therefore it is

Ordered that the supplemental petition and complaint of said Charles P. Robbins, as such shareholders agent shall be filed and that the clerk of the above Court shall issue proper and appropriate summons therefor.

Done in open Court this 5 day of October, 1942.

L. B. SCHWELLENBACH

Judge.

Presented by

THOS A E LALLY

Attorney for said Charles P.
Robbins.

Approved as to form.

WITHERSPOON WITHER-
SPOON & KELLEY

Attorneys for Investment and
Securities Co.

EDWARD M. CONNELLY &
HARVEY ERICKSON

Collector.

[Endorsed]: Filed Oct 5 1942. [58]

[Title of Court and Cause.]

SUPPLEMENTAL PETITION AND
COMPLAINT

The above named Interpleader, Charles P. Robbins, as above described alleges against *against* the above named persons:

—1—

That Charles P. Robbins is the duly elected, qualified and acting shareholders Agent for the Shareholders of the Exchange National Bank of Spokane, Washington, an insolvent National Banking Association; that the above named Investment and Securities Co. is a corporation organized under the laws of the State of Washington with its principal place of business in Spokane, Washington; that the above named Frank Kuhl is collector of internal revenue for the State of Wisconsin; that the above named Judson G. Rosebush and Barbara J. McNaughton Rosebush are husband and wife married one to the other and are residents of Appleton, Wisconsin.

—2—

That all of the debts and obligations of the said association dues its creditors have heretofore been paid by the receiver thereof.

—3—

That said shareholders agent has reduced to cash all of the assets that were delivered to him by the Receiver of the said association and has made distribution of the greater part of said cash to the

shareholders of said association who have paid their stock assessment; that in said cash was the sum of \$6,500.00 ordinarily payable by said interpleader to the said Judson G. Rosebush because of such stock assessment paid by him to the receiver of said association; that because of the facts hereinafter set out, this interpleader in 1941 deposited in the registry of the above court and with the Clerk thereof the sum of \$6,500.00 aforesaid and filed his plea in the above court asking the Court to determine which claimant was entitled thereto.

—4—

That said Investment and Security Co. and said Frank Kuhl, Collector of Internal Revenue for Wisconsin, during 1941 at present and for some years prior have each made adverse claims to the said money and any additional money that this interpleader might thereafter have and that would ordinarily be payable to said Judson G. Rosebush; and threatened to sue this interpleader if he paid any of said sums to any one except the said respective claimant.

—5—

That since this interpleader filed his original petition herein the said Investments and Securities Co. and the said Frank Kuhl as such collector of internal [59] revenue have filed their pleadings herein setting out their respective claims to the said money;

—6—

That as this interpleader is informed and believes

and on information and belief alleges the facts to be that the said defendants Judson G. Rosebush and Barbara J. McNaughton Rosebush each or both of them assert some claim of right, title or interest in and to the said \$6,500.00 and such additional sums of money as said interpleader may have hereafter and ordinarily payable to the said Judson G. Rosebush.

—7—

That this interpleader does not know which of the said persons have the prior or valid right to the possession of the said moneys and will not know until the said defendants Judson G. Rosebush and Barbara J. McNaughton Rosebush file their answer or other pleading herein setting out their right, title and interest in and to said money and until the above Court shall have heard all of the evidence and facts relied upon and offered by the said Investment and Securities Co. the said Frank Kuhl, Collector of Internal Revenue for Wisconsin and the said Judson G. Rosebush and Barbara J. McNaughton Rosebush.

—8—

That the sum of \$250.00 and his costs is a reasonable sum to be allowed this interpleader as attorney fees from the said sum or from the unprevailing parties hereto.

Wherefore Interpleader Prays Decree, decreeing: which of the said persons or corporation is entitled to the said \$6,500.00 and such additional sum as he may have and ordinarily payable to the said

Judson G. Rosebush; that the said Judson G. Rosebush and Barbara J. McNaughton Rosebush and other parties hereto by answer or other appropriate pleading set out their right title, lien, equity and interest and ownership in and to any and all of said money; that if any of them fail to so plead and fail to establish their prior right or lien to said money that they be foreclosed and barred from thereafter asserting any claim thereto and from commencing any suit or action against the interpleader as such shareholders agent or otherwise to recover the same or any *aprt* or on account thereof; that he be allowed attorney fee in the sum of \$250.00 and his costs from said money or from such of the parties hereto as may have the inferior right to such money and for [60] such other relief as is just.

THOS A E LALLY

Attorney for Interpleader.

1123 Paulsen Bldg.

Spokane, Washington.

State of Washington

County of Spokane—ss.

Charles P. Robbins, being forst duly sworn upon oath deposes and says that he is the interpleader; that he has read the foregoing, knows the contents thereof and believes the same to be true.

CHARLES P. ROBBINS

Subscribed and sworn to before me this 28th day of Sept. 1942.

[Notarial Seal] THOS A. E. LALLY

Notary Public residing at
Spokane, Wash.

Received Copy Hereof This 5th day of October 1942 and Consent to the Filing Hereof.

WITHERSPOON WITHER-
SPOON & KELLEY

Attorneys for Investment and
Securities Co.

EDWARD M. CONNELLY &
HARVEY ERICKSON

Attorneys for Frank Kuhl,
Collector

[Endorsed]: Filed Oct 5 1942. [61]

[Title of Court and Cause.]

SUMMONS (Sixty days)

To the above named: Supplemental Defendants,
Judson G. Rosebush and Barbara J. McNaughton
Rosebush, his wife

You are hereby summoned and required to serve
upon

Witherspoon, Witherspoon & Kelley, Peyton Building,
Spokane, Washington, Attorneys for Investment and Securities Co. a corporation,

Thomas A. E. Lally, Paulsen Building, Spokane,
Washington, Attorney for Charles P. Robbins,
Shareholders' Agent of the Shareholders of
The Exchange National Bank of Spokane, an
insolvent National Banking Association,

and

Edward M. Connelly, United States Attorney, Spo-
kane, Washington, Attorney for Frank J. Kuhl,
Collector of Internal Revenue for Wisconsin

an answer to the supplemental petition and com-
plaint which is herewith served upon you, within
sixty days after service of this summons upon you,
exclusive of the day of service. If you fail to do so,
judgment by default will be taken against you for
the relief demanded in the supplemental petition
and complaint.

[Seal]

A. A. LaFRAMBOISE

Clerk of Court

By

Deputy Clerk

Dated October 6, 1942

RETURN ON SERVICE OF WRIT EASTERN
DISTRICT OF WISCONSIN, ss.

I hereby certify and return, that on the 13th day
of October 1942, I received the within summons
& and served them on the within names Judson
G. Rosebush & Barbara J. Rosebush by showing
them this summons and delivering to each personally

a true copy thereof, this 14th day of October 1942
at Appleton Wisconsin.

ANTON J. LUKASZEWICZ

United States Marshal.

By RUSSELL C. KNIGHT

Deputy United States
Marshal.

Marshal's Fees

Travel \$7.92

Service 4.00

11.92

Subscribed and sworn to before me, a
this day of 19....

.....

(Note.—Affidavit required only if service is made
by a person other than a United States Marshal or
his deputy.)

[Endorsed]: Filed Oct 19 1942. [62]

[Title of Court and Cause.]

MARSHAL'S RETURN OF SERVICE (SIXTY
DAY SUMMONS AND SUPPLEMENTAL
PETITION AND COMPLAINT)

I, Russell C. Knight being first duly sworn upon
oath deposes and says that at all times herein men-
tioned he was and now is a Deputy U. S. Marshal
of the United States District Court, Eastern Dis-
trict and says that on the 14th day of October,

1942 in the City of Appleton, Wis. and County of Outagamie, State of Wisconsin, I did personally served the 60 day summons and copy of Supplemental Petition and Complaint upon each Judson G. Rosebush and Barbara J. Rosebush, by delivering to and leaving with each a true copy thereof, on the 14th day of October A. D. 1942 at Appleton, Wisconsin.

ANTON J. LUKASZEWICZ

U. S. Marshal

By RUSSELL C. KNIGHT

Deputy

Service 4.00

Travel 7.92

\$11.92

[Endorsed]: Filed Nov 17 1942. [63]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division

No. 235

INVESTMENT AND SECURITIES COMPANY,
a corporation,

Plaintiff,

vs.

CHARLES P. ROBBINS, Shareholders' Agent of
the Shareholders of The Exchange National
Bank of Spokane, Washington,
Cross-Defendant,

FRANK J. KUHL, Collector of Internal Revenue
for Wisconsin,
Defendant,

UNITED STATES OF AMERICA,
Intervenor,

JUDSON G. ROSEBUSH and BARBARA J.
McNAUGHTON ROSEBUSH,
Defendants.

MOTION TO VACATE ORDER JOINING JUD-
SON G. ROSEBUSH AND BARBARA J.
McNAUGHTON ROSEBUSH AS DEFEND-
ANTS

Come now Edward M. Connelly, United States
Attorney for the Eastern District of Washington,
and Harvey Erickson, Assistant United States At-

torney for said District, and move the Court to vacate its order of October 5, 1942, granting the petition of Charles P. Robbins, Shareholders' Agent, to file a supplemental complaint against Judson G. Rosebush and Barbara J. McNaughton Rosebush as additional defendants;

And petitioners further move for the Court to strike the supplemental petition and complaint of Charles P. Robbins filed on said date.

This motion is based upon the records and files herein and the opinion of the United States District Court for the Eastern District of Wisconsin rendered in the case of United States of America v. Judson G. Rosebush, defendant, Charles P. Robbins, Shareholders' Agent for the Shareholders of Exchange National Bank of Spokane, Washington, garnishee-defendant, and Barbara J. McNaughton Rosebush, additional defendant.

EDWARD M. CONNELLY

United States Attorney

HARVEY ERICKSON

Assistant United States

Attorney [64]

Copy received this 23rd day of October, 1942.

THOS A E LALLY

Attorney for Charles P.

Robbins

[Endorsed]: Filed Oct 23 1942. [65]

[Title of Court and Cause.]

AFFIDAVIT RESISTANCE OF CHARLES P.
ROBBINS, SHAREHOLDERS AGENT TO
THE MOTION OF THE UNITED STATES
ATTORNEY TO VACATE THE ORDER
JOINING JUDSON G. ROSEBUSH AND
BARBARA J. McNAUGHTON ROSEBUSH

State of Washington

County of Spokane—ss.

Charles P. Robbins being first duly sworn upon oath deposes and says: that he is the above named Shareholders, Agent Cross-Defendant herein; that the supplemental complaint of this affiant against the parties above named and particularly against the said Judson G. Rosebush and Barbara J. McNaughton Rosebush and the Order permitting the filing and service of the same, was done with the permission of all of the parties hereto;

that there is no such case as cited by the United States Attorney in his motion to strike the order of this Court, in that this affiant was not a party to the said alleged or any other action in the United States District Court for the Eastern District of Wisconsin or elsewhere in which the said Judson G. Rosebush and Barbara J. McNaughton Rosebush or either of them were parties; that any opinion, order or judgment or decree in any action or suit involving any of the parties hereto was and is not res adjudicata as to the said two persons and this affiant because this affiant has never appeared in or been a party plaintiff or defendant in any action or suit in which any of said parties

was such a party save in the main suit at bar in which said order was issued; that the said supplemental petition and complaint of this affiant was served on the said Judson G. Rosebush and Barbara J. McNaughton Rosebush in the State of Wisconsin on October 12th 1942 by the United States Marshall; that affiant was informed of this fact by his attorney who received a defective return of service from said United States Marshall and which return was sent back to said marshall for proper execution;

that unless the filing and serving of said supplemental petition and complaint against the said Judson G. Rosebush and Barbara J. McNaughton Rosebush are permitted to stand and the said two persons forced to answer or default thereto, this affiant can be sued by them after the determination of the above main suit for the same identical money in suit herein and after the above Court shall have decreed herein that the same shall be paid to some of the other parties already a party herein; [66]

that the said supplemental petition and complaint will terminate all possible other suits by either or any of said parties against this affiant, and unless it is so finally determined herein he will be unable to terminate his trust as such Shareholders Agent and as such officer of and answerable to this Court; that except for the final disposition of the money he has deposited herein for the Court to finally dispose of, his duties as such officer and agent are now complete.

CHAS. P. ROBBINS

Shareholders Agent of the Shareholders of The
Exchange National Bank of Spokane, Wash.

Subscribed and sworn to before me this 27th day of October 1942.

[Notarial Seal] THOS A E LALLY

Notary Public residing in
Spokane, Wash.

THOS A E LALLY

Attorney for said Shareholders
Agent.

Received copy hereof this 27th day of October 1942.

WITHERSPOON, WITHER-
SPOON & KELLEY

Attorneys for Investment and
Securities Company.

EDWARD M. CONNELLY &
HARVEY ERICKSON

United States Attorney

[Endorsed]: Filed Oct 27 1942. [67]

[Title of Court and Cause.]

DECREE AGAINST SUPPLEMENTAL DE-
FENDANTS, JUDSON G. ROSEBUSH AND
BARBARA J. McNAUGHTON ROSEBUSH

This cause coming on for hearing on this date on oral motion of the Cross-Defendant, Charles P. Robbins, Shareholders Agent of the Shareholders of The Exchange National Bank of Spokane, Washington, for this decree, and it appearing to the Court that the supplemental petition and com-

plaint of said Cross Defendant together with sixty days summons issued out of this Court were personally served on the supplemental defendants, Judson G. Rosebush and Barbara J. McNaughton Rosebush, his wife; that no pleadings, answer or appearance was made by either of them herein; that after more than sixty days had elapsed after and exclusive of the day and date of service of said summons and complaint on them that default was entered herein; and the Court being advised in the premises, It Is Ordered and Decreed that said default is hereby approved; that neither of said Supplemental Defendants, Judson G. Rosebush and Barbara J. McNaughton Rosebush, his wife, has any right, title or interest in or to the \$6,500.00 which said Cross Defendant has paid into the registry of this court nor to any other sum or sums that he may hereafter pay into said registry, nor to any other sums that said Cross Defendant may have or may hereafter have as such Shareholders Agent and they and each of them are forever barred from asserting any claims or claim to, for or against any of said sums or against the said Shareholders Agent on account thereof.

Done in open Court this 12th day of January 1943.

L. B. SCHWELLENBACH

Judge

[Endorsed]: Filed Jan 12 1943. [68]

[Title of Court and Cause.]

ORDER DENYING MOTION OF UNITED
STATES OF AMERICA TO VACATE
JOINDER OF DEFENDANTS ROSEBUSH

This Cause Coming on for hearing on this date on the motion of The United States Attorney, on behalf of the United States of America and Frank J. Kuhl, Collector of Internal Revenue for Wisconsin, to vacate the order of this Court joining Judson G. Rosebush and Barbara J. McNaughton Rosebush, his wife as parties defendant herein, and after argument of Counsel, and it appearing that the Court has heretofore entered decree herein against the said Judson G. Rosebush and Barbara J. McNaughton Rosebush, his wife, and the Court being advised in the premises, it is ordered that the said motion is and the same be hereby denied.

Done in open Court this 13th day of January,
1943

L. B. SCHWELLENBACH
Judge.

[Endorsed]: Filed Jan 13 1943. [69]

[Title of Court and Cause.]

ORDER IN RE PRE-TRIAL HEARING

This matter comes on for hearing on a pre-trial conference, on the 12th and 13th days of January,

1943, Mr. William V. Kelley appearing as attorney for the plaintiff, Mr. Thomas A. E. Lally appearing as attorney for cross-defendant and interpleader, and Mr. Harvey E. Erickson appearing for defendant Frank J. Kuhl and the United States of America.

Motion of the United States for summary judgment presented and Denied.

Decree against supplemental defendants Judson G. Rosebush and Barbara J. McNaughton Rosebush, his wife, signed.

Motion of the United States of America to vacate order joining Judson G. Rosebush, et ux, as parties defendant, Denied. Order on said motion signed.

The motion of the Investment & Securities Company to make more definite and certain, directed to the answer of defendant Kuhl, was then presented and argued. In compliance with paragraph 1 of plaintiff's motion to make more definite and certain, directed to paragraph 7 of the answer of defendant Kuhl, said defendant introduced Defendant's Exhibits "1" to "14", which, with the deposition of Judson G. Rosebush, defendant asserts constitutes in its entirety its proof as to that portion of paragraph 7 of his answer, as was moved against by the plaintiff. Said exhibits are received in evidence subject to the right of the plaintiff to object as to their materiality and relevancy at the time of the trial.

In response to paragraph 2 of plaintiff's motion to make the answer of defendant Kuhl more definite and certain, said defendant asserts that its proof as

to how Judson G. Rosebush undertook to transfer his rights in the stock and assessment on October 7, 1935, to his wife, will be limited to testimony of said Rosebush on that point in his deposition.

Plaintiff's motion to strike from paragraph VII of the answer of the defendant Kuhl is Denied.

Plaintiff's motion to strike from paragraph 8 of the answer of the defendant Kuhl is Granted.

Defendant's Indentification 15 is marked, plaintiff agreeing that it may be offered at the trial without objection because it is a photo- [70] static copy, but reserving all other objections.

Plaintiff's motion to strike from paragraph 10 of the answer of defendant Kuhl is Denied without prejudice to the plaintiff's right at the time of the trial to contend that the issuance of the writ of garnishment was ineffectual and of no legal consequence.

As to Paragraph 9 of the answer of the Defendant Kuhl, Defendant's Indentification 16 is marked, with the understanding that when offered in evidence the plaintiff will raise no objection because they are photostatic copies and will require no further identification, but reserves all other objections, and it is also stipulated that the assessment list was received by the Collector of Internal Revenue at Milwaukee on February 18, 1934, and that there was filed with the Register of Deeds at Appleton, Wisconsin, and with the Clerk of the United States District Court at Milwaukee, in April, 1934, the Government's Notice of Lien, it being understood that by this admission the plaintiff

in no way admits the Government's contention as to the legal effect of said filings.

As to Paragraph 10 of the answer of Defendant Kuhl, the plaintiff admits that on November 27, 1941, judgment was entered in the United States District Court for the Eastern District of Wisconsin, against Judson G. Rosebush in the sum of \$37,220.85, on said Judson G. Rosebush's 1928 income tax.

As to complaint of the Investment & Securities Company, the allegations of Paragraphs 1, 2, 3, and 4 are admitted by all parties.

As to Paragraph 5 of said complaint, it is stipulated that wherever in the pleadings in this case reference is made to the sum of \$4,250.00, it shall be deemed to be \$6500.00.

As to Paragraph 6 of said complaint, Defendant Kuhl admits the allegations of said paragraph but asserts that the writ of fieri facias was valid.

As to Paragraph 10 of said complaint, all parties agree that the assignment was served on Charles P. Robbins by the Investment & Securities Company March 4, 1938.

As to Paragraph 12 of said complaint, it is admitted by all parties [71] that no notice of tax lien was filed in Spokane County or with the Clerk of this court prior to December 1, 1941.

It is admitted that the Government has no proof in support of its allegation in Paragraph 4 of its answer that the money was ever in the possession of the Investment & Securities Company.

As to the answer of Cross-Defendant Robbins, it is stipulated that if attorney's fees are allowed, they shall be fixed by The Court without submission of evidence.

This cause is set for trial on Tuesday, February 23, 1943, at 10 o'clock A. M.

Dated this 19 day of January, 1943.

L. B. SCHWELLENBACH

United States District Judge

Approved:

WILLIAM V. KELLEY

Attorney for Plaintiff

THOS. A E LALLY

Attorney for Cross-Defendant
Robbins

Approved as to Form Only

HARVEY ERICKSON

Attorney for Defendant Kuhl and United States
of America

[Endorsed]: Filed Jan 19 1943. [72]

[Title of Court and Cause.]

REPLY TO ANSWER OF DEFENDANT
FRANK J. KUHL

Comes now complainant and petitioner, Investment and Securities Co., and replying to Answer of Defendant, Frank J. Kuhl, denies all affirmative allegations, matters and things therein set forth

except as admitted in the Order In Re: Pre-Trial Conference of January 12 and 13, 1943.

Wherefore, Complainant and petitioner prays that defendant, Frank J. Kuhl, take nothing by his Answer and affirmative defenses as against complainant and petitioner and that complainant and petitioner have judgment against defendant Frank J. Kuhl as prayed for and for its costs and disbursements incurred herein.

WITHERSPOON WITHER-
SPOON & KELLEY

By W. V. KELLEY

Attorneys for Complainant
and Petitioner.

Copy Received this 28th of January, 1943.

EDWARD M. CONNELLY

United States Attorney
Attorneys for defendant

[Endorsed]: Filed Jan 28 1943. [73]

[Title of Court and Cause.]

REPLY TO ANSWER IN INTERVENTION
OF THE UNITED STATES OF AMERICA

Comes now complainant and petitioner, Investment and Securities Co., and replying to Answer In Intervention of applicant for intervention, United States of America, denies all affirmative allegations, matters and things therein set forth

except as admitted in the Order In Re: Pre-Trial Conference of January 12 and 13, 1942.

Wherefore, Complainant and petitioner prays that applicant for intervention, United States of America, take nothing by its Answer and affirmative defenses as against complainant and petitioner and that complainant and petitioner have judgment against applicant for intervention, United States of America as prayed for and for its costs and disbursements incurred herein.

WITHERSPOON WITHER-
SPOON & KELLEY

By W. V. KELLEY

Attorneys for Complainant
and Petitioner.

Copy received this 28th day of January, 1943.

EDWARD M. CONNELLY

United States Attorney
Attorneys for defendant

[Endorsed]: Filed Jan 28 1943. [74]

[Title of Court and Cause.]

STIPULATION COMPLAINANT AND PETI-
TIONER MAY AMEND REPLIES TO
ANSWERS

The parties stipulate that complainant and petitioner may amend its replies to the answer of defendant Frank J. Kuhl and to the answer in intervention of the United States of America

Dated this 13 day of February, 1943.

WITHERSPOON WITHER-
SPOON & KELLEY

W. V. KELLEY

Attorneys for Complainant
and Petitioner

EDWARD M. CONNELLY

HARVEY ERICKSON

Attorneys for Defendant and
United States of America

[Endorsed]: Filed Feb 13 1943. [75]

[Title of Court and Cause.]

AMENDED REPLY TO ANSWER IN INTER-
VENTION OF THE UNITED STATES OF
AMERICA

Complainant and petitioner, Investment and Securities Co., pursuant to stipulation and amending its reply to the answer in intervention of the United States of America, denies all affirmative allegations, matters and things therein set forth except as admitted in the order in re Pretrial Conference of January 12 and 13, 1943.

And for a further and separate reply, complainant and petitioner alleges:

I.

That the claim of United States of America to the sum of \$6500.00, or any other sums, deposited in the registry of this court by the cross-defendant

Charles P. Robbins, is barred by the provisions of Internal Revenue Code Section 276 (c), Title 26 U. S. C. A. Sec. 276 (c); that prior to December 1, 1941 no notice of a tax lien was filed either with the Clerk of the Federal District Court for the Eastern District of Washington, or the County Auditor of Spokane County, Washington; that more than six years have elapsed since the assessment list was received by the Collector of Internal Revenue at Milwaukee, Wisconsin, on February 18, 1934, and since the filing with the registrar of deeds at Appleton, Wisconsin, and with the Clerk of the United States District Court at Milwaukee in April, 1934, of the alleged Government's notice of Lien without any attempt to collect said tax alleged in defendant's answer by distraint or by court proceedings pursuant to Internal Revenue Code Section 276 (c), Title 26 U. S. C. A. Sec. 276 (c).

Wherefore complainant and petitioner prays that the United States of America take nothing by its answer in intervention and that complainant and petitioner have judgment against the United States of America as prayed for and for its costs and disbursements incurred herein.

WITHERSPOON WITHER-
SPOON & KELLEY

By W V KELLEY

Attorneys for Complainant
and Petitioner [76]

Copy received this 13th day of Feb, 1943.

EDWARD M. CONNELLY &

HARVEY ERICKSON

Attorneys for Defendants

[Endorsed]: Filed Feb 13 1943. [77]

[Title of Court and Cause.]

AMENDED REPLY TO ANSWER OF DEFENDANT FRANK J. KUHL

Complainant and petitioner, Investment and Securities Co., pursuant to stipulation and amending its reply to the answer of defendant Frank J. Kuhl, denies all affirmative allegations, matters and things therein set forth except as admitted in the order in re Pretrial Conference of January 12 and 13, 1943.

And for a further and separate reply, complainant and petitioner alleges:

I.

That the claim of defendant Frank J. Kuhl to the sum of \$6500.00, or any other sums, deposited in the registry of this court by the cross-defendant Charles P. Robbins, is barred by the provisions of Internal Revenue Code Section 276 (c), Title 26 U. S. C. A. Sec. 276 (c); that prior to December 1, 1941 no notice of a tax lien was filed either with the Clerk of the Federal District Court for the Eastern District of Washington, or the County

Auditor of Spokane County, Washington; that more than six years have elapsed since the assessment list was received by the Collector of Internal Revenue at Milwaukee, Wisconsin, on February 18, 1934, and since the filing with the registrar of deeds at Appleton, Wisconsin, and with the Clerk of the United States District Court at Milwaukee in April, 1934, of the alleged Government's Notice of Lien without any attempt to collect said tax alleged in defendant's answer by distraint or by court proceedings pursuant to Internal Revenue Code Section 276 (c), Title 26 U. S. C. A. Sec. 276 (c).

Wherefore complainant and petitioner prays that defendant Frank J. Kuhl, take nothing by his answer and affirmative defenses as against complainant and petitioner and that complainant and petitioner have judgment against defendant Frank J. Kuhl as prayed for and for its costs and disbursements incurred herein.

WITHERSPOON WITHER-
SPOON & KELLEY

By W. V. KELLEY

Attorneys for complainant
and petitioner [78]

Copy received this 13th day of Feb., 1943.

EDW. M. CONNELLY &
HARVEY ERICKSON

Attorneys for Defendant.

[Endorsed]: Filed Feb 13 1943. [79]

In the United States District Court for the Eastern
District of Washington—Northern Division

No. 235

INVESTMENT AND SECURITIES COMPANY,
a corporation

Plaintiff,

vs.

CHARLES P. ROBBINS, Shareholders' Agent of
The Shareholders of the Exchange National
Bank of Spokane, Washington,
Cross-Defendant and Interpleader

vs.

FRANK J. KUHL, Collector of Internal Revenue
for Wisconsin,

Defendant

UNITED STATES OF AMERICA,
Additional Intervenor

vs.

JUDSON G. ROSEBUSH and BARBARA J.
McNAUGHTON ROSEBUSH, his wife,
Supplemental Defendants

Before The Honorable L. B. Schwellenbach, Judge
of the above-styled Court and District.

On February 23, 1943.

Appearances:

For the Plaintiff:

Witherspoon, Witherspoon and Kelley,
Counsel.

For the Cross-Defendant:

Mr. Thomas A. E. Lally,
Counsel.

For the Additional Intervenor, U. S. A. and Defendant, Frank J. Kuhl, Collector of Internal Revenue District of Wisconsin:

Mr. Harvey Erickson,
Assistant U. S. District Attorney for the
Eastern District of Washington.

Reporter:

J. J. Cole.

STATEMENT OF FACTS [80]

The above entitled cause coming on for hearing and for trial before the Honorable L. B. Schwellenbach, Judge of the above-styled Court, and all parties having announced ready for trial, the following proceedings were had:

On January 12 and 13, 1943, this matter came on for hearing on a pre-trial conference, Mr. William V. Kelley appearing as attorney for the plaintiff, Mr. Thomas A. E. Lally, appearing as attorney for cross-defendant and interpleader, and Mr. Harvey E. Erickson appearing for defendant Frank J. Kuhl, and the United States of America, and the following "order in re pre-trial hearing"

was signed by the Court on the 19th day of January, 1943.

Motion of the United States for summary judgment presented and denied.

Decree against supplemental defendants Judson G. Rosebush and Barbara J. McNaughton Rosebush, his wife signed.

Motion of the United States of America to vacate order joining Judson G. Rosebush, et ux. as parties defendant, denied. Order on said motion signed.

The motion of the Investment & Securities Company to make more definite and certain, directed to the answer of defendant Kuhl was then presented and argued. In compliance with paragraph 1 of plaintiff's motion to make more definite and certain, directed to paragraph 7 of the answer of defendant Kuhl, said defendant introduced Defendant's exhibits '1' to '14' which, with the deposition of Judson G. Rosebush, defendant, asserts constitutes in its entirety is [82] proof as to that portion of paragraph 7 of his answer, as was moved against by the plaintiff. Said exhibits are received in evidence subject to the right of the plaintiff to object as to their materiality and relevancy at the time of the trial.

In response to paragraph 2 of plaintiff's motion to make the answer of defendant Kuhl more definite and certain, said defendant asserts that its proof as to how Judson G. Rosebush undertook to transfer his rights in the stock and assessment on October 7, 1935, to his wife, will be limited to tes-

timony of said Rosebush on that point in his deposition.

Plaintiff's motion to strike from paragraph VII of the answer of the defendant Kuhl is Denied.

Plaintiff's motion to strike from paragraph 8 of the answer of the defendant Kuhl is Granted

Defendant's Identification 15 is marked, plaintiff agreeing that it may be offered at the trial without objection because it is a photostatic copy, but reserving all other objections.

Plaintiff's motion to strike from paragraph 10 of the answer of defendant Kuhl is Denied without prejudice to the plaintiff's right at the time of the trial to contend that the issuance of the writ of garnishment was ineffectual and of no legal consequence.

As to Paragraph 9 of the answer of the defendant Kuhl, Defendant's Identification 16 is marked, with the understanding that when offered in evidence the [83] plaintiff will raise no objection because they are photostatic copies and will require no further identification, but reserves all other objections, and it is also stipulated that the assessment list was received by the Collector of Internal Revenue at Milwaukee on February 18, 1934, and that there was filed with the Register of Deeds at Appleton, Wisconsin, and with the Clerk of the United States District Court at Milwaukee, in April, 1934, the Government's Notice of Lien, it being understood that by this admission the plaintiff in no way admits the Government's contention as to the legal effect of said filings.

As to Paragraph 10 of the answer of defendant Kuhl, the plaintiff admits that on November 27, 1941, judgment was entered in the United States District Court for the Eastern District of Wisconsin, against Judson G. Rosebush in the sum of \$37,-220.85, on said Judson G. Rosebush's 1928 income tax.

As to complaint of the Investment & Securities Company, the allegations of Paragraphs 1, 2, 3. and 4 are admitted by all parties.

As to Paragraph 5 of said complaint, it is stipulated that wherever in the pleadings in this case reference is made to the sum of \$4250.00, it shall be deemed to be \$6500.00.

As to Paragraph 6 of said complaint, Defendant Kuhl admits the allegations of said paragraph but asserts that the writ of fieri facias was valid.

As to Paragraph 10 of said complaint, [84] all parties agree that the assignment was served on Charles P. Robbins by the Investment & Securities Company March 14, 1938.

As to Paragraph 12 of said complaint, it is admitted by all parties that no notice of tax lien was filed in Spokane County or with the Clerk of this court prior to December 1, 1941.

It is admitted that the Government has no proof in support of its allegation in Paragraph 4 of its answer that the money was ever in the possession of the Investment & Securities Company.

As to the answer of Cross-Defendant Robbins, it is stipulated that if attorney's fees are allowed, they shall be fixed by the Court without submission of evidence.

This cause is set for trial on Tuesday, February 23, 1943, at 10 o'clock A. M.

Mr. Kelley: Your Honor, would it be in order for the record to show that all the allegations of the complaint in intervention and petition for relief on behalf of the Investment & Securities Company are admitted, and the additional fact that \$6500.00 is the sum that is now on deposit——

Judge Schwellenbach: You said "All of the allegations", shouldn't you say "All the facts alleged"——

Mr. Kelley: Yes, your Honor, I should have said all of the facts alleged; that the sum of \$6500.00 is now on deposit in Court. [85]

Mr. Erickson: I don't know if I can say that or enter into a stipulation, if that is what Mr. Kelley asks, to that effect, but I will say so far as the facts of his complaint right now there is no dispute. The only thing is as to the conclusions of law that he has interspersed with his facts.

L. A. STILSON,

a witness called for and on behalf of the plaintiff,
having been duly sworn, testified as follows:

Direct Examination

By Mr. Kelley:

Q. State your name please.

A. L. A. Stilson.

Q. What is your occupation, Mr. Stilson?

A. At present I am with the Old National Bank.

(Testimony of L. A. Stilson.)

Q. Were you formerly associated with the Investment & Securities Company? A. I was.

Q. For what period of time?

A. From 1933 until January 1942.

Q. In what capacity?

A. As vice president.

Q. Are you the officer and individual of the Investment & Securities Company who had the Judson G. Rosebush account? A. That's right.

Q. Briefly, inform the Court as to how the Investment & Securities Company got that account and what was the [86] situation leading up to the execution of the contract of July 27, 1937?

A. Well, the account came to us from the Old National Bank in 1933 when the bank was re-organized.

Judge Schwellenbach: I think the record might as well show the Investment & Securities Company is a company for the collection and liquidation of unsatisfied accounts at the time the Old National Bank went into the hands of the Conservator.

Mr. Kelley: That is right.

Judge Schwellenbach: And that there came in as one of the items transferred by the Old National Bank this account.

Mr. Kelley: That's right.

Q. Then the Judson Rosebush item came in as one of the accounts transferred to you by the Old National Bank? A. That is correct.

Q. What was the status of that account immedi-

(Testimony of L. A. Stilson.)

ately prior to the execution of the contract on July 27, 1937?

A. I don't understand exactly——

Q. What was owing on the account?

A. Oh, there was—originally it was \$100,000, and we foreclosed on the collateral to the amount of about \$25,000.00, which left remaining a balance of approximately \$75,000.00 with a large amount of accrued interest.

Q. When was your attention directed to the fact that Mr. Rosebush had paid assessments on certain shares of the Exchange National Bank of Spokane? [87]

A. We had a file of his financial statements, and as I recall it I ran into the fact he had formerly owned stock in the Exchange National in some of his old statements, and I heard the Exchange National would pay its creditors in full, and have some over to pay over to the former stockholders who had paid their assessments.

Q. Were you desirous of having the Rosebush rights by virtue of the assessments he had paid on the Exchange National Bank assigned to the Investments & Securities Company for his indebtedness? A. Yes.

Q. What steps did you take to effectuate that?

A. We asked him to pledge it as additional security to his indebtedness. At the time we foreclosed the stock that had been pledged there was a little argument on the sufficiency of our foreclosure and he asked for some concession, the right to re-

(Testimony of L. A. Stilson.)

deem the stock, or if it sold for more than they were bid in at the sale, and in general negotiations we should agree, if he would give us additional security or collateral in the form of the Exchange claim, we would give him certain concessions and the right to redeem the stock that had been foreclosed, or any overplus if sold within a reasonable period of time.

Q. You were attempting to collect the debt Rosebush owed your institution? A. That's right.

Q. You had considerable correspondence with Rosebush between the date of March 29, 1937, until the contract [88] of July 27, 1937, was executed.

A. Oh yes, I had correspondence with Mr. Rosebush for ten years.

Q. In having such correspondence, what was your practice at the Investment & Securities, you as an officer, with respect to signing letters and so forth?

A. Well, ordinarily the letters were dictated to the stenographer and returned for correction and signature, and I would sign the original and either sign or initial the copies as a general rule.

Q. Directing your attention to defendant's exhibits marked for identification Exhibits "2" to "15" inclusive, look those over and state whether or not they appear to be photostatic copies of some of the correspondence you had with Mr. Rosebush during that period.

Judge Schwollenbach: "15" was not admitted.

(Testimony of L. A. Stilson.)

You admitted "1" to "14" inclusive, but reserved the right to object to "15", Mr. Kelley.

Mr. Kelley: I see. Thank you, your Honor.

Witness: These exhibits "2" to "12" seem to be all photostatic copies of the original letters, except exhibit "10", which was written by Mr. Kimmel, who was secretary of the Investment & Securities. These other two exhibits—"14" I believe, is deleted pages of the agreement when it was corrected, and "15" is apparently a letter from Mrs. Rosebush to Mr. Rosebush.

Q. Directing your attention to defendant's exhibit "10" being a letter from Mr. Kimmel to Rosebush, June 30, [89] 1937—

Judge Schwellenbach: Exhibits "1" to "14" are in evidence?

Court Clerk: They were just marked for identification.

Mr. Kelley: Well then, I didn't know that. Are they admitted now?

Judge Schwellenbach: They are admitted, but you can re-open if you want to, and move they be stricken.

Mr. Kelley: No, on the contrary, I will offer them.

Judge Schwellenbach: You don't need to do that.

[Printer's Note: Defendants' Exhibits Nos. 2 to 14 are set out in full at pages 171 to 193 of this printed record.]

Q. Directing your attention to defendant's exhibit "10" being the letter of Mr. Kimmel to Mr.

(Testimony of L. A. Stilson.)

Rosebush under date of June 30, 1937, how did Mr. Kimmel happen to write that instead of yourself?

A. I was on vacation at the time.

Q. Did Mr. Kimmel have anything to do with the details of this Judson Rosebush account?

A. No, I handled the account.

Q. Directing your attention to defendant's Exhibit "5" being the letter Rosebush to Stilson, under date of April 20, 1937, did you answer that letter?

A. I believe that was answered—I recall that. The offer was turned down. I think our file will show when it was turned down by letter or——

Q. Handing you plaintiff's exhibit marked "A" for [90] identification I will ask you to state what that is.

A. This is an office copy of a letter dated April 28, written by me and addressed to Mr. Rosebush at Appleton, Wisconsin.

Q. Directing your attention to the second page, what is that in handwriting there?

A. Those are my initials.

Q. What are they? A. L. A. S.

Q. Who wrote that, can you tell by examining the exhibits who typed the letter for you?

A. Yes, the stenographer's initial "G" refers to Miss Galbraith who was stenographer in our office about that time.

Q. What handwriting is that "Betty Galbraith"?

(Testimony of L. A. Stilson.)

A. I don't know whose handwriting that is.

Mr. Kelley: I would like to offer plaintiff's Exhibit "A".

Mr. Erickson: I would like to ask a few questions on voir dire.

Judge Schwellenbach: Very well.

Questions on Voir Dire

Q. (By Mr. Erickson) Mr. Stilson, do you have an independent recollection at this time of writing this letter at that time?

A. Yes, I have a general recollection of refusing that offer and I wrote a rather harsh letter, frankly, more or less giving him a certain length of time in which to [91] conform.

Q. According to your practice in the office there, you signed the letters and the girl in the office mailed them? A. Yes.

Q. And according to the indication on the letter, it was not sent by registered mail?

A. No, it would be so marked if sent by registered mail.

Q. And there is no such mark on it?

A. No such mark.

Mr. Erickson: I object to the letter on the grounds previously specified—the demand was made upon us too late, and the deposition of Mr. Rosebush does not definitely fix any such letter as having been received, and at the time of the taking of the deposition last August, there was ample time to question Mr. Rosebush by the plaintiff more thoroughly on this letter, and, furthermore, in the

(Testimony of L. A. Stilson.)

pre-trial conference this letter was not brought up or intimated any such letter was in existence.

Judge Schwellenbach: From my understanding of the deposition as read, is that he showed the letter to Mr. Rosebush and Mr. Rosebush said he had some recollection of a letter of that sort and he didn't think he turned it over to the government. He showed it to you, Mr. Erickson, and it's true that notice to produce was given very late, but I can't see where there is [92] any prejudice. The attention of the government was called to it. Mr. Rosebush indicated he had received a letter something like this, and Mr. Stilson's testimony he sent the letter. I think I will allow it.

Plaintiff's identification "A" letter, April 28th, received in evidence and becomes Plaintiff's Exhibit "A".

[Printer's Note: Plaintiff's Exhibit "A" set out in full at page 164 of this printed record.]

Judge Schwellenbach: What is the next letter after the 28th?

Mr. Kelley: June 2, defendant's exhibit "6".

Judge Schwellenbach: Let me see defendant's letter, Rosebush wrote to you and then your letter—wasn't there another letter from Rosebush too. In other words, he wrote you on April 20th to the effect he would like to buy this Inland Empire Paper stock, you answer that on April 28th. Then in your letter of the 2nd you say "In connection

(Testimony of L. A. Stilson.)

with your recent letter * * * * I do not believe our trustees would be in favor of such a sale at any price * * * *” —It seems to me that would indicate you received a letter after you turned him down on April 28th.

Witness: That’s right.

Judge Schwellenbach: Then you refer to a “recent” letter—that is some indication of a letter received from him in response to your letter of April 28th.

Witness: I don’t recall having seen any in the file.

Mr. Kelley: I wonder if you’d go through [93] that again——

Judge Schwellenbach: When you say in your letter “This agreement is in accordance with our understanding”——

Witness: Mr. Rosebush was in the office on a trip out here about the time we were negotiating that agreement and I know we discussed it to a certain extent orally at the time of one of the visits. I couldn’t give you the date of that visit, but I do remember one afternoon he was in the office and we discussed such an agreement quite thoroughly.

Mr. Kelley: Q. Did he or did he not ever state to you he had consulted with attorneys in the east with respect to drawing such an agreement of July 27, 1937?

A. I had a good many talks with Mr. Rosebush, they were rather extended; sometimes it would be two or three hours. I remember a reference in one

(Testimony of L. A. Stilson.)

of the conferences to Brezeau & Graves who acted for him—some eastern attorneys and he spoke of consulting them concerning such an agreement in general terms, the date of that statement I can't give you, we had too many conferences and talks.

Q. Well, directing your attention to Exhibit "C" for identification attached to the deposition to Judson G. Rosebush under date of August 11, 1942, being a letter in longhand and under date of May 8, 1937, state whether you received that.

A. Yes, I recall this letter.

Q. Were these conversations somewhere around the date shown in that exhibit? [94]

A. Yes, they were while we were negotiating the contract which extended from some time in March until it was actually signed, I believe, in July. He was out here on business and dropped in. That may have been more than one time. He frequently came out here at that time.

Q. You received that exhibit to which your attention has just been directed?

A. I have no independent recollection of having received it. I presume it came from our files.

Q. You recognize the hand writing?

A. Yes.

Q. And the handwriting is—

A. Mr. Rosebush's.

Mr. Kelley: I would like to offer it.

Mr. Erickson: It's already in evidence—it's already offered as part of the deposition.

Mr. Kelley: No, it isn't.

(Testimony of L. A. Stilson.)

Mr. Erickson: The deposition was ordered published.

Judge Schwellenbach: What do you intend to do about this deposition? It's published, that's true, but that doesn't make it part of the record.

Mr. Erickson: I intend to offer it as part of the record.

Judge Schwellenbach: Do you intend to offer the entire deposition?

Mr. Erickson: Yes, and all the attached exhibits. [95]

Judge Schwellenbach: Is there any particular reason for wanting to take it out of this deposition?

Mr. Kelley: No, your Honor, except I want to make sure I identify it properly for the record, and if admitted I wanted to ask the witness this question——

Q. Did you at any time, orally or in writing, at any place, agree with Judson G. Rosebush that the tax lien of the United States government arose by virtue of the assessment received in Milwaukee in February 1934 was a superior claim to your contract claim, the contract of July 27, 1937, did you ever so agree or admit?

A. We never agreed or admitted the government's claim was prior to ours, or considered it so.

Mr. Kelley: You may inquire.

(Testimony of L. A. Stilson.)

Cross Examination

By Mr. Erickson:

Q. You say you asked Mr. Rosebush to pledge his claim against the Exchange National Bank to you—did you use the word “assign” instead of “pledge”?

A. The assignment of it would be a pledge.

Q. You considered assignment would be the same as pledging.

A. Yes.

Q. And in the following correspondence you did use the term “assign”?

A. I presume it would be.

Q. And in this correspondence with Mr. Rosebush you do not recall whether or not Mr. Rosebush told you he had [96] the advice of counsel?

A. I recall at one conference now, the exact date of that conference I cannot recall, he stated his attorneys had said he better not sign that unless he had had something in it about the claim of the government?

Q. Do you recall the time Mr. Rosebush asked to submit this agreement to the Collector of Internal Revenue for the District of Wisconsin?

A. I do.

Q. You didn't agree with Mr. Rosebush's submission of the agreement to the Collector first?

A. I did not.

Q. Why not?

A. I felt the United States government and the Investment and Securities Company were both

(Testimony of L. A. Stilson.)

creditors of Mr. Rosebush and I felt this was an asset that was pledged to neither. If he went to them they would immediately attach it. It was a footrace who would get there first.

Judge Schwellenbach: Did he tell you Brezeau & Graves were his attorneys back there?

A. Oh no, he at different times had letters from Brezeau & Graves I believe, and I recall they did some work for him. They worked for firms with which he was connected and I think he at times discussed his personal affairs with them, but I couldn't say they were his personal attorneys.

Q. (By Mr. Kelley). By the way, you were making or attempting to make the collection of the Rosebush indebtedness so that payments would be made in part to the share- [97] holders of the Old National Bank?

Mr. Erickson: I object to that as immaterial and irrelevant.

Judge Schwellenbach: Objection sustained.

Mr. Kelley: I think that is all. Your Honor, I have Mr. George Kimmel of the Investment & Securities but if all of these Exhibits are admitted, it won't be necessary to have him identify that letter of June 30th, 1937.

Judge Schwellenbach: They are all in excepting you reserve the right to move to have them stricken on the ground they were not relevant or material and if you don't do that they still stay in.

Q. Mr. Stilson, what is the reason you didn't

(Testimony of L. A. Stilson.)

consider the United States government had a prior claim to your contract of July 27, 1937?

Mr. Erickson: I object to that as incompetent and immaterial—what he thinks.

Judge Schwellenbach: Objection overruled.

A. Well, at the time we first heard of this claim Mr. Rosebush had against the Exchange National I went to our attorneys and asked them if this was subject to the lien of the Department of Internal Revenue and they did a little briefing on it and told me they thought very probably it was not subject to it, and cited various legal points. [98]

Q. In short your conduct was on advice of counsel?

A. Yes, sir.

Mr. Kelley: You may inquire.

Mr. Erickson: No questions.

Mr. Kelley: That's our testimony, your Honor.

Mr. Erickson: I have no testimony other than—let's see—Exhibits 1 to 14 are received in evidence, I believe. I would like the reception in evidence of the other defendant's exhibits now, "15" and "16"—"16" has several parts to it.

Judge Schwellenbach: Defendant's "15" is——

Mr. Kelley: Letter, Rosebush to Robbins, isn't it, your Honor?

Judge Schwellenbach: You are offering that, Mr. Erickson?

Mr. Erickson: Yes.

Judge Schwellenbach: Any objections, Mr. Kelley?

Mr. Kelley: We have no objection if it can be agreed that the carbon copy that brought forth that letter can be admitted.

Mr. Erickson: I don't know anything about a carbon copy.

Judge Schwellenbach: Plaintiff's "B"—is that Robbins to Rosebush? [99]

Mr. Kelley: Yes.

Judge Schwellenbach: What is the date of that?

Mr. Kelley: June 10. I wonder if Mr. Erickson would agree to admit plaintiff's "B" at the same time?

Mr. Erickson: I don't see the materiality.

Mr. Kelley: The materiality is just that it goes to the continuity of the matter. The only reason Mr. Rosebush wrote the letter "15" was that Mr. Robbins had written him a letter. In other words, this wasn't voluntary.

Judge Schwellenbach: It may be admitted, defendant's "15" and plaintiff's "B". Now, defendant's "16"—what will we call that?

[Printer's Note: Defendant's Exhibit No. 15 is set out in full at page 193 of this printed record. Plaintiff's Exhibit "B" is set out in full at page 166 of this printed record.]

Mr. Erickson: That's the Collector's procedure in Wisconsin.

Court Clerk: It's plaintiff's "16", "16—E to R", inclusive.

Judge Schwellenbach: Any objection to that?

Mr. Kelley: I think not, your Honor. No objection.

Judge Schwellenbach: It may be admitted.

[Printer's Note: Plaintiff's Exhibits 16-E to 16-R are set out in full on pages 195 to 208 of this printed record.]

Mr. Erickson: That's our case then. Oh, the deposition, pardon me. I move for reception in [100] evidence of the deposition at this time and the Exhibits attached thereto.

Mr. Kelley: The only thing is, your Honor, I hoped it would be read into the evidence and as we went along if there was anything objectionable I would have the opportunity to object.

Judge Schwellenbach: That is the customary way to do it.

Mr. Erickson: Yes, if Mr. Kelley wants to take the time to do it, if there is anything of that nature in there.

Mr. Kelley: Well, I can, if I had the opportunity to examine it—it would be a few days probably.

Judge Schwellenbach: Can't the record show the deposition of Mr. Rosebush may be copied by the reporter as part of the evidence in this case, then if between now and the next time the matter comes up you decide you want to object to any portions then the reporter can come back and you may do so, otherwise it won't be necessary for her to come back. There are two Exhibits, the contract attached to the deposition——

Mr. Kelley: Hasn't that been admitted?

Mr. Erickson: Yes, that has been admitted already.

Judge Schwellenbach: Then there is that letter marked plaintiff's Exhibit "C"—you might take out the letter "C" and mark it as plaintiff's Exhibit "C", [101] letter of Mr. Rosebush to Mr. Stilson, May 8, 1937. There is no reason for putting the Attorney General's letter in.

[Printer's Note: Plaintiff's Exhibit "C" is set out in full at page 167 of this printed record.]

Mr. Kelley: Only on this point, they don't list the letter of April 28th in it—for whatever it's worth that omission ought to be noted.

Judge Schwellenbach: He didn't know whether he turned it over to the Government or not, and Mr. Erickson's statement here on your notice to produce, the other day, they didn't have it.

Mr. Kelley: I would like to inquire if Mr. Erickson cares to interrogate Mr. Stilson or Mr. Kimmel or if they may be excused.

Mr. Erickson: They may be excused.

Judge Schwellenbach: Have you any testimony, Mr. Lally?

Mr. Lally: No, your Honor. May I say this: Prior to any pleadings being served by either the Investment & Securities Company or the Collector of Internal Revenue or the Government, Charles Robbins filed a Bill of Interpleader, alleging in substance the undisputed fact that he had this money which he was ready to disburse to whoever owned it, and he was threatened with suit by both of these parties, and we ask that we be allowed attorney fees

and our costs, and I have forgotten the amount of attorney fees alleged but will not take the time to introduce any evidence on it.

Judge Schwellenbach: The other two counsel have stipulated I can fix attorney fees without [102] submission of testimony, would you stipulate to that?

Mr. Lally: Yes.

Judge Schwellenbach: Go ahead, briefly, Mr. Kelley, with your argument.

Whereupon, a short argument was made to the Court by Mr. Kelley and Mr. Erickson, during which time plaintiff's Exhibit 'D', certified copy tax lien filed in the office of the County Registry, of Iron County, Michigan, was offered and received in evidence.

[Printer's Note: Plaintiff's Exhibit "D" is set out in full at page 168 of this printed record.] [103]

DEPOSITION OF JUDSON G. ROSEBUSH,

Taken at the office of Witherspoon, Witherspoon & Kelley, Peyton Building, Spokane, Washington, August 11, 1942, at two p.m.

At the time of the taking of the above deposition plaintiff was represented by Mr. W. V. Kelley, of Counsel, and cross-defendant by Mr. Thomas A. E. Lally, Counsel, and the intervenor by Mr. Harvey Erickson, assistant U. S. District Attorney for the Eastern District of Washington. The deposition was taken pursuant to notice theretofore served.

JUDSON G. ROSEBUSH,

having been sworn to tell the truth, the whole truth and nothing but the truth, testified as follows on

Direct Examination

By Mr. W. V. Kelley.

Q. Your name is Judson G. Rosebush?

A. Yes.

Q. And whereabouts do you live?

A. Appleton, Wisconsin.

Q. Are you the same Judson G. Rosebush who was named as defendant in the cause entitled "United States of America, plaintiff, versus Judson G. Rosebush, defendant, and Barbara J. McNaughton Rosebush, additional defendant, in the District Court of Wisconsin, in the Eastern District of Wisconsin", being "Civil Action No. 5079"? A. I am. [104]

Q. Briefly, in that action, judgment in the original complaint against you has been entered in the amount of \$37,220.85.

A. As of June 16, 1940, yes.

Q. How long have you been a resident of Appleton, Wisconsin? A. Since 1903.

Q. Mr. Rosebush, referring to that action, do you recall the date of the judgment?

A. Yes, June 16, 1940.

Q. What is the amount of your indebtedness to the United States now because of that action?

A. Thirty-seven thousand dollars, plus interest.

Q. What is the amount of your indebtedness, roughly, to the Investment Securities Company?

(Deposition of Judson G. Rosebush.)

A. About seventy-thousand dollars.

Q. That is the Investment & Securities Company, a Washington corporation, that is liquidating the percentage of the frozen assets of the Old National Banking institution? A. Yes.

Q. Directing your attention, Mr. Rosebush, to a copy of the answer in intervention in the cause entitled "Investment & Securities Company versus Charles P. Robbins, Shareholders' Agent in the District Court of the United States for the Eastern District of Washington, Northern Division" and specifically to Exhibit "B" which is attached and made a part of said answer in intervention—if you will take the time to examine this—is that a copy of a certain agreement under [105] date of July 27, 1937, entered into by and between the Investment & Securities Company and yourself?

Mr. Kelley: I have an extra copy here and you can mark it and attach it to the deposition.

Mr. Lally: Do you have a duplicate in the pleadings.

Mr. Kelley: I think not.

Witness: This looks like, but I could not tell without specifically verifying it that it is.

Mr. Erickson: Do you have the original document.

Mr. Kelley: No, I don't Harvey, not right here.

(Mr. Lally hands document to witness).

Mr. Kelley: Let the record show that Mr. Lally representing the cross-defendant Mr. Charles B.

(Deposition of Judson G. Rosebush.)

Robbins, Shareholders' Agent, shows the witness an executed copy.

Mr. Lally: Let him check that copy briefly with this.

Witness: Of course I haven't any doubt about it but I wouldn't want to say this is a duplicate of the other without having it before me.

Mr. Kelley: That's right.

(Witness checks copy handed him by Mr. Kelley with original, executed copy, handed him by Mr. Lally).

Witness: Well, they are identical.

Q. Back in July, 1937, July 27, 1937, you were indebted to the Investment & Securities Company on two notes [106] aggregating approximately \$100,000.00. A. Yes.

Q. And you had various conferences with the Investment & Securities Company concerning the indebtedness? A. Yes.

Q. Mr. L. A. Stilson was the individual with whom you corresponded and conferred?

A. He and Mr. Kimmel.

Q. At that time, on July 27, 1937, you knew that the Investment & Securities Company, liquidating part of the former assets of the Old National Bank was desirous of getting as much as it could out of the various indebtednesses?

A. They told me so.

Q. Well, you knew that in turn the collateral or securities the Investment Securities would re-

(Deposition of Judson G. Rosebush.)

ceive from its various debtors, would, in turn, be assigned to the Reconstruction Finance Corporation.

A. I am not sure that I did.

Q. But you recall that on July 27, 1937, the Investment & Securities, through Mr. L. A. Stilson wanted to get as much security from you as possible for their indebtedness?

A. That's correct.

Q. At that time, did you own some Exchange National Bank stock? A. Yes.

Q. How many shares did you own?

A. 250.

Q. The Exchange National Bank stock was a stock of [107] a national corporation in Spokane by that name. A. That's right.

Q. And you had held that stock since that date?

A. Various dates in the twenties.

Q. Prior to July 27, 1937, had you paid assessments on that Exchange National Bank stock?

A. In full.

Q. How much was that.

A. Twenty-five-thousand dollars.

Q. The occasion for those assessments was the action taken by the receiver and his successors of the Exchange National Bank subsequent to its failure as a National banking institution in 1929?

A. Well, the occasion for it was the hundred percent liability which they demanded.

Q. Which was made upon you as a stockholder,

(Deposition of Judson G. Rosebush.)

subsequent to the Exchange National Bank's failure? A. Yes.

Q. On or about July 27, 1937, the Investment & Securities Company wanted you to assign your claim which you might have on account of the assessments which you had paid on the stock of the Exchange National Bank—the Investment & Securities wanted you to assign that to itself?

A. Shortly before that time they asked for an assignment of that claim?

Q. Where was the stock then?

A. The stock of the Bank?

Q. Yes. [108] A. In my possession.

Q. Where was the stock of the Exchange National Bank in your name at that time?

A. In my possession.

Q. Whereabouts? A. At Appleton.

Q. Wisconsin? A. That's right.

Q. Had you transferred that stock of the Exchange National Bank to your wife, Barbara J. McNaughton Rosebush, on October 7, 1935?

A. No.

Q. Has that stock of the Exchange National Bank in your own name, always remained in your own name? A. It has.

Q. And that Exchange National Bank stock has never been transferred or assigned to any person at any time save and except as indicated in the agreement of July 27, 1937, between yourself and the Investment Securities?

A. It wasn't assigned then.

(Deposition of Judson G. Rosebush.)

Q. But outside of that agreement of July 27, 1937, you did not assign or transfer that stock to anyone else at any time?

A. The stock has always been in my possession, has always belonged to me, and is now my stock.

Q. Did you ever transfer a certificate of assessment which you might have received, because of your ownership of that stock? A. Yes. [109]

Q. To whom did you transfer the certificate of assessment?

A. To Barbara J. McNaughton Rosebush.

Q. What was the date of that transfer?

A. October 7, 1935.

Q. What were the mechanics of that transfer, may I ask?

A. It was just a book account and she has separate books and I have separate books, and her account was charged with the amount and mine was credited on those books.

Q. Did you ever notify the Exchange National Bank of the transfer of the certificate of assessment of the Exchange National Bank stock?

A. There was no certificate of assessment.

Q. Well, what did you transfer to your wife on October 7, 1935? A. A book account.

Q. And did you ever notify the Exchange National Bank of that transfer? A. No.

Q. How did you get the book account back in your own name? A. I never did.

Q. Did you ever tell the Investment & Securities of your transfer of that book account?

(Deposition of Judson G. Rosebush.)

A. No.

Q. From March 19, 1937, through July 27, 1937, you corresponded with Mr. Stilson of the Investment & Securities [110] Company.

A. Well, I haven't any of the correspondence here, Mr. Kelley.

Q. Do you have in your possession any of that correspondence? A. No.

Q. Where is that correspondence, may I ask?

A. United States Internal Revenue Department has it.

Q. Do you happen to have with you a list of the correspondence they have? A. No.

Q. Do you think you could get such a list for us?

A. Well, I can ask them, of course.

Q. I thought you might have some record yourself.

A. No, I gave them all the original correspondence.

Q. Mr. Rosebush, have you given to the government all of the original correspondence passing between the Investment & Securities and yourself from approximately March 29, 1937 to date, concerning this? A. So far as I know, yes.

Q. By the way, referring to this case here in the District Court of the United States for the Eastern District of Washington, you don't claim any of the fund paid into this Court yourself?

A. Well, what from—you mean assessment paid?

(Deposition of Judson G. Rosebush.)

Q. Yes. [111]

A. Do I claim them for myself?

Q. Mr. Lally: Do you mean personally from Robbins to him?

Witness: He means liquidating dividends.

Q. Mr. Robbins, Charles P. Robbins, Shareholders' Agent, has paid sums aggregating \$6500.00 into the Court Registry, or perhaps other sums, as shareholders' Agent of the Exchange National Bank, in this cause, which sums would ordinarily be payable to yourself. Do you claim any of those sums? A. I do not make any claim.

Q. At the time you executed the agreement of July 27, 1937, with the Investment & Securities Company, Mr. Rosebush, you were in Appleton, Wisconsin? A. Yes.

Q. And Mr. Stilson and the other officers of the Investment & Securities Company were in Spokane? A. I don't know.

Q. Well, put it this way. You executed this agreement first yourself, then sent it to them out in Spokane for execution.

A. I don't recall who executed first.

Mr. Lally: I think the instrument shows it. One was executed in Wisconsin and one in Spokane.

Q. I hand you this executed copy produced by Mr. Lally for the purpose of refreshing your recollection.

(Witness examines document).

A. We executed on July 27. [112]

(Deposition of Judson G. Rosebush.)

Q. 1937? A. That's right.

Q. Now, at the time you executed that what was the situation with regard to your income tax?

A. The assessment had been made effective as of February 1934, and notice of distraint was out against me.

Q. You informed the Investment & Securities that you owed the United States Government moneys for income tax? A. Yes.

Q. Who was the individual that you informed, Mr. Stilson?

A. I presume so. Of course my letters were directed to the Investment & Securities Company. I might have directed to him as Vice-President. I don't recall without referring to the correspondence.

Q. At the time that you executed the contract on July 27, 1937, you understood that the Investment & Securities Company did not recognize the Government's claim as a first lien?

A. No sir, I understood no such thing.

Q. What was your understanding?

A. That they were taking it subject to a lien.

Q. When you say that you mean they were taking the assignment of whatever claim you might have by virtue of paying your assessment on the Exchange National Bank—they were taking that subject to the Government lien?

A. That's right and it is so stated in the agreement.

(Deposition of Judson G. Rosebush.)

Q. Will you state whether or not Mr. Stilson told you that the Securities & Investment did not know which [113] had the prior claim, the Government or his organization?

A. I have no recollection of such a statement made by Mr. Stilson at that time. He did make such a statement I think, in 1940 or 1941, but at that time I have no recollection of his making any such statement. However the record would show.

Q. And your recollection might be faulty.

A. My recollection may be at fault.

Q. But you did understand at the time that the agreement of July 27, 1937 was executed that the Investment & Securities Company was claiming a first lien upon the amounts, if any, which would be returned by virtue of your payment of your assessment on Exchange National Bank stock.

A. No, I didn't understand that at all. They were taking that claim subject to whatever claims the Government might have and there the matter rested as far as I recall.

Q. Well, you do recall, do you not, that there was a question as to whether the Government had a first lien upon such moneys or whether or not a first lien could be so created by an assignment such as the one entered into with Investment & Securities Company on July 27, 1937.

A. That wasn't at issue at all between us.

Q. Was it discussed?

A. No. As I said before the claim was turned

(Deposition of Judson G. Rosebush.)

over to them subject to whatever rights the Government might have and the agreement so specifically states.

Q. You had made a full disclosure to the Investment & Securities of your income tax indebtedness to the [114] *the* United States?

A. Well to the extent that the assessment as made was \$24,000. Of course, there may have been accrued interest on that which I didn't know. But the assessment was made—they know that.

Q. By assessment you mean the Government's claim?

A. The Government's assessment of February, 1934.

Q. Did you in fact tell them there had been a notice of distraint?

A. Yes, I told them that, too.

Q. The reason you told them that was you wanted to make a full disclosure of your condition to your creditors.

A. In this particular case I didn't want to turn that book account over to them with a very serious cloud upon it without their knowing such a cloud existed. Whether that was a real cloud, or not, we were not deciding at that time.

Q. In other words you turned it over as a conditional matter which would have to be settled between the United States and Investment & Securities at some future date.

A. Or be compromised between the Investment

(Deposition of Judson G. Rosebush.)

& Securities Company and me, or by compromise between the Government and myself.

Q. Just explain that.

A. You can settle a claim by payment of account, or a compromise settlement. If you make a compromise settlement of course all claims would be liquidated.

Q. Are you still hopeful of doing that in your situation? [115]

A. You want me to be a prophet, Mr. Kelley?

Q. No, I asked you the question advisedly for the record——

Mr. Erickson: I object to that question.

A. I don't know.

Q. Well the Investment & Securities on the occasion you executed the contract of July 27, 1937, told you that they did not believe the order of distraint would be prior to the assignment?

A. I have no such recollection, Mr. Kelley, Now, the record—the letters might show they did, but I have no such recollection.

Q. You might be mistaken in that?

A. I might be mistaken.

Q. In any event there was no agreement between you and the Investment & Securities Company that this assignment to the Investment & Securities Company would be subsequent and junior to the Government's lien. You simply left it for the future to determine, isn't that correct?

A. No. The agreement specifically says I was

(Deposition of Judson G. Rosebush.)

turning it over subject to any liens or claims they had—the agreement.

Q. I understand, but I am asking these questions and would like to find out your intention.

Question read: ‘Q. In any event, there was no agreement between you and the Investment & Securities Company that this assignment to the Investment & Securities would be subsequent and junior to the Government’s lien?’. [116]

A. The full agreement is set forth in the document as drafted.

Q. Did you consult counsel about this agreement of July 27, 1937? A. No, I did not.

Q. At the time that you executed the agreement of July 27, 1937, Mr. Rosebush, you understood that the Investment & Securities Company at least was claiming a first lien—— A. No.

Mr. Erickson: I object to that. It’s been asked twice.

Q. Well, since that time on different occasions haven’t you so stated that that was your understanding?

A. No. I saw Mr. A. W. Witherspoon in August, 1941, and I told him at that time I considered the claim of the Government was senior to their claim.

Q. I understand—but you also knew the Investment & Securities Company claimed to have the first lien and when the document was executed the status of the claim was to be left to the future, isn’t that correct?

(Deposition of Judson G. Rosebush.)

A. No. Not until Mr. Stilson wrote me some months ago they claimed a first lien did I know that by direct statement from him. Now, that's my memory. I may be at fault.

Q. When was the first time you realized the Investment & Securities claimed a first lien?

A. When I got Mr. Stilson's letter——

(Witness gets letter from files.) January 13, [117] 1924—Stilson to Rosebush. In the opinion of our attorneys any lien that the Government may have had has become Junior to ours or become lost entirely under the Statute of Limitations'.

Q. How long have you been out here on your last visit? A. This time?

A. Yes.

A. Oh, I got here a week ago Wednesday night. A week ago last Wednesday night.

Q. And you discussed this matter with Mr. Stilson and Mr. Kimmel last week, August 6th to be exact? A. Yes.

Q. Up in room 221 Old National Bank Building. A. It was the second floor anyway.

Q. Have you read the answer of the defendant Frank J. Kuhl in this matter?

A. In this case?

Q. Yes. A. No sir.

Q. By the way, the indebtedness which you had reference to in the contract of July 27, 1937, was that money that had been loaned directly to you?

A. I think not. I think the bulk of that was a note to the Exchange National Bank that the

(Deposition of Judson G. Rosebush.)

Old National Bank bought—without notice on my part until after the purchase.

Q. The money had been loaned—the original money however had been loaned to you?

A. By the Exchange National Bank. [118]

Q. And it was your understanding the indebtedness was subsequently assigned to the Old National Bank.

A. Yes. That is true regarding the bulk of that note. Now, there might have been a small part of it wasn't. But regarding the bulk of the note that statement is correct.

Q. You wrote Mr. Robbins, shareholders agent of the Exchange National Bank asking him to hold all checks until the Investment & Securities and the United States Government could settle their claims.

A. Well, I don't know whether I initiated the correspondence or whether he or Mr. Kimmel initiated it. At any rate there was an agreement finally reached.

Mr. Kelley: That is all.

Mr. Erickson: Is there any objection, Mr. Kelley, to entering a stipulation as to the admissibility of the agreement of July 27, 1937, at this time—stipulate to receive it in evidence—is there any objection?

Mr. Lally: If you gentlemen agree I will agree. You understand I am interpleader and supposed to be——

(Deposition of Judson G. Rosebush.)

Mr. Kelley: I don't have the original here.

Mr. Erickson: We can stipulate that the original will be introduced when it is produced.

Witness: I said that copy was identical with the original, so if you turn that in why doesn't it serve your purpose? [119]

Mr. Kelley: It's all right with me, if it's agreeable with the witness. You can have this. This is the same one you compared.

Witness: I went through it close enough to know it is the same.

Mr. Erickson: Then we can stipulate that copy.

Mr. Lally: That's agreeable. That is a correct copy of the original and may be introduced in lieu of the original.

Mr. Erickson: Yes, that is the one that Mr. Rosebush just compared.

(Whereupon: The agreement of July 27, 1937, entered into by and between Investment & Securities Company, a Washington Corporation, of Spokane, Washington, and Judson G. Rosebush, of Appleton, Wisconsin, marked Exhibit "A" to deposition of Judson G. Rosebush).

Cross Examination

By Mr. Erickson:

Q. Now, your indebtedness to the United States is \$26,000 as a result of income taxes in 1934.

A. Various figures—one figure is \$24,000 and one figure is \$26,000, the judgment, however, is for \$37,000 finally entered.

(Deposition of Judson G. Rosebush.)

Q. That included interest, penalties and so forth?

A. Yes, I assume it did. It's the amount entered in the judgment. [120]

Q. And the notice of assessment and distraint was given to you April 17th, 1934, or thereabouts.

A. In February and April of 1934.

Q. That was income tax for what year?

A. 1928.

Q. And that amount is substantially still due and unpaid? A. Correct.

Q. You then were a stockholder in the Exchange National Bank and owned 250 shares of stock in that bank.

A. I held 250 shares of stock in the Exchange National Bank.

Q. And you became indebted to the Investment & Securities Company through some dealings which the Old National Bank had with the Exchange National?

A. Largely, but not entirely.

Q. You had some independent business——

A. With the Old National—that's my recollection. The bulk of that debt arose out of the purchase of the Exchange National by the Old National, but it's my recollection a minor part of it was owing to the Old National.

Q. When the Old National failed the Investment and Securities took over the liquidation of the Old National Bank. A. So they told me.

Q. Do you know what your indebtedness was

(Deposition of Judson G. Rosebush.)

to the Investment & Securities as of July 27, 1937?

A. Well, it was more than \$70,000. [121]

Q. Well, that's close enough. Prior to the execution of this agreement of July 27, 1937, you had considerable correspondence with Mr. L. A. Stilson and Mr. Kimmel of the Investment & Securities Company.

A. I had some. I wouldn't say it was considerable.

Q. And in that correspondence you told the Investment & Securities Company, Mr. Stilson and Mr. Kimmel, of your obligations to the United States Government, did you not? A. Yes.

Q. I will hand you Government's Exhibit 'B' for identification and ask you what that is. If you recall that exhibit.

A. This was a letter from me to Mr. Stilson, dated April 6, 1937—I recognize the letter.

Q. And in that letter you stated to Mr. Stilson that you are not a free agent to assign your equity in the Exchange National Bank stock. In other words, you say you presume the 'notice of distraint will cover this as well as other assets, and on the other hand I am hoping presently to get that out of the way and until I do I wonder if it would not be pre-mature to make any other agreement regarding that item'. You wrote that.

A. Yes, I did.

Q. And in answer to that did you receive a letter from the Investment & Securities Company?

(Counsel hands witness document.)

(Deposition of Judson G. Rosebush.)

A. Yes, I remember that letter. [122]

Q. A letter dated April 14, 1937, signed by L. A. Stilson in which thy state to you as follows:

‘We have submitted to our attorneys the question of assignment by you of your claim against the Exchange National Bank on account of the super-added liability paid on the stock, and they have advised us that an assignment on your part could be executed without any question, that *that* it might develop the lien of the United States Government would be prior to the lien created by this assignment, a matter which would have to be determined at a later date when, as and if the funds are payable on the claim against the bank. We are willing to go ahead with the program outlined in our letter of March 29th with the full understanding that the assignment of the Exchange National Bank might be subject to a prior claim to the United States’.

Mr. Stilson wrote you that, did he not?

A. That’s right.

Q. In reply to that—referring to this letter of June 11th, 1937, do you recall that? A. Yes.

Q. In which you state as follows: ‘In reply to yours of June 2nd the agreement inclosed seems to be satisfactory except that on page 3 you have not made note of the fact that the U. S. Internal Revenue Department has a *lien* prior to yours. That has been covered by our correspondence, but it seems to me it ought to be included in the agreement.’ You wrote that, did you not?

(Deposition of Judson G. Rosebush.)

A. Yes sir.

Q. Then in reply to your letter the Investment [123] and Securities Company wrote you on June 16, 1937, did they not? A. Yes.

Q. In that letter Mr. Stilson wrote you as follows:

‘I have your letter of June 11th, 1937, in which you state that the agreement which we submitted to you is satisfactory with the exception that you feel that a statement should be inserted that the United States Internal Revenue Department has a prior lien on your claim against the Exchange National Bank. I have discussed this with our attorneys and they feel such a citation in the agreement would be out of order as it has not yet been definitely determined whether or not their lien would be prior to a proper assignment. This would be a matter that would have to be determined when, as and if a disbursement would be made on the Exchange National claim. Due to the fact we have notice of the lien of the Government and the nature of the lien our attorneys feel that the agreement should be satisfactory without such a statement as there could not possibly be any contention on our part that you had or were misrepresenting the status of the claim’. Then on June 21st, 1937, you wrote to Mr. Stilson, did you not? A. Yes sir.

Q. In that letter you told Mr. Stilson:

‘Yours of the 16th is at hand. In reference to your second paragraph I think the agreement as

(Deposition of Judson G. Rosebush.)

drafted involves me in no possible misunderstanding so far as your company is concerned since from the start of these negotiations [124] you have had notice of the tax lien. My fear in this matter arises from the fact that the notice of distraint set forth that I was not to transfer any more of my property until that tax was paid, so that if I make the agreement with you as you have drafted it I am, on the face of it, disregarding the notice of the Federal Internal Revenue Unit. It seems to me, therefore, for my own protection as regards the Internal Revenue Unit you should either redraft the agreement so the United States could not hereafter claim I had violated their order, or if you do not want to do that I should then present your proposed agreement to the Internal Revenue Unit and see if they were willing to let it stand as now drafted—' You wrote that to Mr. Stilson on June 21st, did you not? A. Yes sir.

Q. Mr. Kelley: Are you going to read the last paragraph?

Mr. Erickson: (Reading) 'As you can clearly see from the above I have a tremendous respect for the power of the United States Government and do not wilfully want to run afoul of that power'.

Then on June 30th, 1937, Mr. Kimmel, The Secretary wrote you, did he not? A. Yes sir.

Q. And in that letter Mr. Kimmel said:

'Our attorneys have rewritten the agreement to

(Deposition of Judson G. Rosebush.)

show that the Collector of Internal Revenue has filed an order of distraint and therefore the assignment to this Company is subject and junior to the claim the Collector of [125] Internal Revenue may have acquired by reason of said order'. Then on July 21st, 1937, Mr. Stilson wrote you this letter, did he not?

(Handing witness letter.)

A. Yes sir.

Q. The substance of this letter is what, Mr. Rosebush, without reading it in full?

A. That they wanted a separate assignment covering the claim against the Exchange National Bank in which no mention would be made of the claim of the Bureau of Internal Revenue, and, also they wanted my Exchange National Bank stock certificates to be endorsed and forwarded to them.

Q. I will ask you whether or not you replied to that letter.

A. Yes, under date of July 27th.

Q. Let me see it a minute, please. (Counsel reads letter) And in that letter beginning at the second paragraph you state 'Regarding the matter of the separate assignment in which no mention is made of the claim of the Bureau of Internal Revenue, and the request of your attorneys that the Exchange National Bank stock certificates be sent to you, I am sorry to say that both of these requests in my opinion are absolutely contrary to

(Deposition of Judson G. Rosebush.)

the notice of distraint which the Internal Revenue Department filed against me for the assignment *standa* as an independent document, and makes no specific reference to the agreement in which the claim of the Internal Revenue Department is given priority, and moreover the notice of distraint prohibits me from turning [126] over any of my stock certificates to any one until their claim is liquidated. Now I may be in error in both of those matters, and accordingly am entirely willing to send the document inclosed in yours of July 21st to the Collector of Internal Revenue at Milwaukee to see if I can sign the assignment, and if he says I can do so I will do so. Accordingly I await your advice in these two matters. Will you kindly cancel my original and return the agreement of which the inclosed is a substitute?'

Mr. Kelley: Do you propose to offer all those photostatic copies in toto?

Mr. Erickson: Yes.

Mr. Kelley: I have no objection if it may be stipulated I can reserve all objections to the competency, relevancy and materiality of them to the time of trial.

Mr. Erickson: That's agreeable. I think you would have that right anyway.

Mr. Kelly: What I wish to do is compare the various photostatic copies. I have no doubt they are correct, Mr. Erickson.

Q. (By Mr. Erickson) Now you speak in this letter of July 27th of cancelling your original and

(Deposition of Judson G. Rosebush.)

‘returning the agreement of which the inclosed is a substitute’—what did you mean by that?

A. Frankly, I can’t tell without running it down. The only explanation I’ve got is this one—this was July 27th, which was the day I executed that final agreement and [127] that I must have sent—that’s what I did—on that date—I sent that agreement in, then I was asking him to cancel my original—I don’t recall what that was about—it’s clear that on July 27th I signed that agreement and sent that in, and then sent this in as a substitute—what the original was I can’t recall.

Q. Did you ever correspond with the Collector of Internal Revenue in Milwaukee to see what his attitude was?

A. No.

Q. Why didn’t you do that?

A. Because I had adequately protected the Government in my opinion.

Q. How do you believe you protected the Government?

A. By setting forth in the agreement that the priority of claims, as the agreement states—

Q. After the execution of this agreement on July 27, 1937, did you have any further contact with the Investment & Securities Company?

A. Well I saw them from time to time and wrote to them from time to time, yes.

Q. And when did you state you were aware for the first time they claimed a lien prior to the United States—

(Deposition of Judson G. Rosebush.)

Mr. Lally: It's in the record. I will give you the date——

Witness: I got a letter from Stilson January 13, 1942. It's in the record already.

Mr. Erickson: I think that's all the [128] questions I have at this time, except putting these letters in evidence.

Mr. Lally: I have a few questions but the main issue is between you and Mr. Kelley and you had better finish, then I will ask a couple of questions to clear up the record.

Redirect Examination

By Mr. Kelley:

Q. Do you have in your possession with you the letter from Mr. L. A. Stilson, Vice-President of the Investment & Securities Company, to yourself under date of March 29th, 1937?

Mr. Erickson: There is a photostatic copy. I am offering all the photostatic copies of all the letters subject to Mr. Kelley's right to inspect them.

A. No, I have not.

Q. Directing your attention to a photostatic copy of a letter from Mr. Stilson to yourself, under date of March 29th, 1937, do you recall receiving the original?

A. Yes sir.

Q. A short time before March 29th, 1937, you had been on a visit to Spokane, had you?

A. Yes.

Q. And at that time you discussed with Mr. Stilson matters concerning the possibility of your

(Deposition of Judson G. Rosebush.)

recovering upon the payment made by you of the super-added liability on the stock of the Exchange National Bank? A. Yes. [129]

Q. And at that time you understood there had been some indication that those who had paid their assessment would receive a partial return of the assessment so paid. A. Yes.

Q. And Stilson on behalf of the Investment & Securities Company at that time wanted you to assign to the company as security for the balance of your indebtedness to the Investment & Securities any recovery that might be made on the assessment repaid on your stock of the Exchange National Bank, is that correct?

A. I think that's correct.

Q. Directing your attention to the letter of March 29th, 1937,—take the time if you so desire to read it—that reflects in a general way the relationship between yourself and the Investment & Securities at that time, namely the creditor and debtor situation. A. Yes.

Q. Have you turned the original of that letter of March 29th, 1937, over the United States Government?

A. I can't recall, did I?

Mr. Erickson: I think you did because we photostated it back in Washington.

Mr. Kelley: I might say this it would help us in our preparing and serving notice, and so forth.

Witness: I recognize this letter. That is a correct photostat.

(Deposition of Judson G. Rosebush.)

Q. Do you have with you a letter of April 28th, 1937, addressed to you? [130] A. No.

Q. From L. A. Stilson, Vice-President.

A. No.

Q. Do you have that in your possession in Appleton, Wisconsin?

(Counsel hands to witness a purported carbon copy.)

Mr. Kelley: Have you got that, Harvey?

Mr. Erickson: No, we haven't got that.

Witness: Well, in a general way I recall that letter, but I don't recall whether I turned that over to the Government, or not.

Q. But you do recall that on or about April 28, 1937, that the Investment & Securities Company through L. A. Stilson insisted that the Government's lien against you for the 1928 income tax payments did not actually exist as a first lien on that date, do you not?

A. No. I have said repeatedly I had no such understanding at that time, Mr. Kelly. I said that repeatedly.

Q. I don't want you to be confused now by my question. On or about that time, April 28th, 1937, Mr. Rosebush, did you not understand the position of the Investment & Securities Company to be that the lien of the United States Government for income tax did not actually exist—didn't you understand that was at least their claim?

A. No. That point was not raised at all be-

(Deposition of Judson G. Rosebush.)

tween us to the best of my recollection. They simply took the stuff as is.

Q. Directing your attention to a letter in longhand written from the Hotel Pfister, in Milwaukee, May 8, 1937, [131] to Mr. L. A. Stilson, Vice-President Investment & Securities Company, I will ask you if that is your handwriting. A. Yes.

Q. Now, directing your attention to plaintiff's exhibit C, being a letter in longhand from yourself to the Investment & Securities, May 8, 1937, does that refresh your recollection as to whether or not, the Investment & Securities on or about April 28, 1937, had insisted that the lien of the Government did not actually exist.

A. No. That point was not at issue at all between us.

Q. I am not asking you that. I am asking whether or not they didn't contend the Government had no lien. A. No sir, not with me.

Q. Then what was the reason for your writing—referring to this exhibit—" * * * but again calling your attention to the fact that it is my belief that the claim of the U. S. Internal Unit on my National Bank stock actually exists, rather than being in the 'might' class as you suggest". What was the reason for writing that language then?

A. Well I can't recall why I phrased it that way.

Q. You did not make a copy of that letter, plaintiff's identification C?

A. If I have, I can't locate it.

(Deposition of Judson G. Rosebush.)

Q. In any event you did not give it to the Government?

A. So far as I know—not. [132]

Mr. Erickson: We have no copy of it. That's in your handwriting?

A. Yes, that is my letter.

Q. (By Mr. Kelley) Did you give the original letter of April 28, 1937, from Mr. L. A. Stilson to yourself, to the Government?

A. I don't recall, Mr. Kelley.

Q. Do you have that with you?

Mr. Erickson: We do not have it. This is the list we got from them. (Handing document to Mr. Kelley). So far as I know that represents it all.

Mr. Kelley: Do you have any objection to having this marked?

Mr. Erickson: No, I don't think so—but I think I should keep it in the file.

(Whereupon it is stipulated document may be marked 'Plaintiff's identification D' and attached to the deposition and a copy of same given to Mr. Erickson.)

Q. Directing your attention to plaintiff's exhibit D for identification, purporting to be a list of all the correspondence you turned over to the Government—is that list there a complete list of the correspondence you turned over—do you have a list of the correspondence you might mail to us?

A. I didn't make a list.

Mr. Kelley: I think that is all.

Mr. Erickson: That's all I have.

(Deposition of Judson G. Rosebush.)

Mr. Lally: I wish to ask a few questions [133] on behalf of Mr. Robbins, interpleader and also called Cross-Defendant.

Examination

By Mr. Lally:

Q. Mr. Rosebush, adverting to the bookkeeping account transfer that took place on the books of account of yourself and those of Mrs. Rosebush, transferring something pertaining to the Exchange National Bank, will you state as nearly as you can the wording of that entry?

A. Well, on my books she was credited with the amount I paid on the assessment and my bank stocks were charged. That would be the journal entry, and that's all there was.

Q. And the converse of that was put on her books? A. Correct.

Q. Was there any definite sum put down?

A. Oh, yes, the amount I had actually put into the assessment.

Q. \$25,000?

A. That's right. There was some odd amount because of some adjustment in interest I had paid your predecessor.

Q. Now I understand you didn't attempt in that entry to transfer stock certificates themselves.

A. No.

Q. You still retained them and considered them yours? A. That's right.

Q. And still do? [134] A. That's right.

Q. As I understand your position in this suit,

(Deposition of Judson G. Rosebush.)

in the United States District Court, here in Spokane, you make no claim yourself, or Mrs. Rosebush, to this money now deposited in Court—that's a matter to be settled by the Court to be given either to the Investment Company or to the Government.

A. I make no claim to that money.

Q. Does Mrs. Rosebush make any claim?

A. Not as against the Investment & Securities Company, and she has made no claim against the Government.

Q. And she never made any claim against Mr. Robbins, shareholders agent? A. No.

Q. Or you have never made any claim on him?

A. I didn't need to make any claim on him, you see.

Q. I assume you knew that Mr. Robbins was depositing this money in Court.

A. That's right.

Q. To let the Court determine which of these two, the Investment & Securities Company or the Government would get it. A. That's right.

Q. You or Mrs. Rosebush have made no objection to that procedure?

A. We haven't made any objection.

Q. You say Mrs. Rosebush makes no claim against the Investment Company or the Government.

A. What Mrs. Rosebush will do as against the Govern- [135] ment is not determined. She makes no claim against the Investment & Securities Company.

(Deposition of Judson G. Rosebush.)

Q. Does she make any claim that Mr. Robbins pay this money to her?

A. Not at the present time no.

Q. She never has in the past?

A. She never has in the past.

Q. So far as you know she isn't going to claim in the future that Mr. Robbins pay it to her?

A. That I don't know. Our position is that we make no claim as against the Investment & Securities Company.

Q. But you and Mrs. Rosebush do make a possible claim against the Government?

A. We have asserted no claim as against the Government.

Q. Have either of you asserted any claim on this money on Mr. Robbins, on behalf of the Government?

A. No.

Q. You of course, testified you never notified Mr. Robbins you had transferred anything regarding this stock assessment liability or money received to Mrs. Rosebush.

A. That's right.

Q. And Mrs. Rosebush, of course, has never done so.

A. No.

Q. Did you ever know of Mrs. Rosebush asserting any right to have this disbursement paid to her? [136]

A. She has never made any such assertion.

Q. Do you know if she knows of this suit out here in this Court?

A. In a general way.

Q. You have told her?

A. Yes.

Q. You told her we deposited the money here?

(Deposition of Judson G. Rosebush.)

A. Yes, she knows about that.

Q. This is possibly conjecture—do you know whether or not she would be willing to file a disclaimer?

A. She would refer that matter to her attorney.

Q. I understood you to answer Mr. Kelley, Mr. Rosebush, that you had written Mr. Robbins, or orally agreed with him that he should withhold payment of any of these disbursements or dividends on account of stock assessment liabilities until the Court made a decision in this suit pending here.

A. That is correct.

Q. In order that then it would be disbursed in accordance with the Court's decree.

A. Well it will have to be eventually, won't it?

Q. Was that by letter or conversation?

A. By letter.

Mr. Lally: I think that is all.

Mr. Erickson: That is all for us.

Mr. Kelley: Just a question or two. [137]

Re-Direct Examination

By Mr. Kelley:

Q. Did you ever tell the Investment & Securities Company that satisfactory arrangements would be made by you to pay the tax of the United States Government?

A. I told them I was hoping to make a contemplated settlement with the Internal Revenue Department.

Q. When did you tell them that?

A. I think that was along in 1937—1936.

(Deposition of Judson G. Rosebush.)

Q. To whom did you tell that?

A. The whole thing is very hazy—that's just a hazy recollection in my mind.

Mr. Erickson: I want it understood I object to this testimony as to the contemplated settlement on the ground it's immaterial and incompetent to the issues.

Q. Do you recall where such a discussion might have taken place?

A. On April 6, 1937, I wrote Stilson 'I am hoping presently to get that (meaning by that the Internal Revenue question) out of the way, and until I do I wonder if it would not be premature to make an agreement regarding it'.

Q. Now did you as a taxpayer ever give the United States Government a waiver in connection with an offer to compromise this claim of theirs you have testified to for income for the year 1928?

A. Not that I can recall.

Q. You never gave them a waiver.

A. Not so far as I can recall.

Witness excused. [138]

State of Washington

County of Spokane—ss.

I, J. J. Cole, Do Hereby Certify: That I am the Court Reporter who reported in shorthand the matters and proceedings occurring at the time of the hearing in the above entitled cause; that the above

and foregoing is a full and accurate transcription of the same.

J. J. COLE,
Court Reporter

[Endorsed]: Filed Aug. 4, 1943. [139]

PLAINTIFF'S EXHIBIT No. A

April 28, 1937

Mr. Judson G. Rosebush
Appleton, Wisconsin

Dear Mr. Rosebush:

We have your letter of April 20th, in which you submitted an offer of \$820.00 in cash for the 820 shares of stock of the Inland Empire Paper Company, which were taken over from you a year ago. In your letter you have not replied to the requests in my former letter, asking for a pledge of your claim against the Exchange National Bank in return for certain concessions on our part.

I have submitted your offer to purchase the Inland Empire Paper Company stock to our Trustees, but it is their position that we will not accept the offer at this time, due to the large amount of your indebtedness which is unpaid and is not secured, and also to the fact that you have not been willing to give us any commitment concerning the claim against the Exchange National Bank. At the present time it appears that unless your affairs improve very materially, there is a large possibility of loss to us on your indebtedness, and as long as the

stock in the Paper Company has speculative possibilities, it would not be fitting for us to sell it for a nominal consideration to you, with no provision being made as to the securing or payment of the balance of the debt. The prospects of the stock in the Inland Empire Paper Company have greatly improved during the past year, due to the very material betterment in the paper industry, and a continuous improvement might create a value and a possibility of recovery on our part in the future, so that a sale at this time under the circumstances would not be justified.

As I stated in my former letter, we are willing to enter into an agreement with you concerning the stock in the Paper Company, and the Nekoosa-Edwards and Northern Paper Mills stocks, providing you will pledge to us your claim against the Exchange National Bank, but this offer will terminate unless it is accepted by you not later than May 10th, 1937, and you are hereby notified that unless we receive an acceptance by you by that date, we will consider the offer refused, and will immediately proceed to institute legal action to clarify the present situation, and to reduce the balance of your indebtedness to us to a judgment. Continuous correspondence between us is no longer necessary, as we have made you a definite proposition and until you have either accepted or rejected it, we do not care to enter into other negotiations,

JGR #2

4-26-37

Unless, therefore, we receive from you not later than May 10th, 1937, an acceptance of our proposal

as set forth in previous correspondence, you may expect us to resort to legal action.

Very truly yours,

L A S

L. A. Stilson, Vice President

LAS:G [140]

PLAINTIFF'S EXHIBIT No. B

Copy - letter

Shareholders' Agent to Rosebush

June 10, 1940.

Mr. Judson G. Rosebush,
Appleton, Wisconsin,

Dear Mr. Rosebush:

We are contemplating paying a dividend upon the claims of persons who have paid their assessments upon their bank stock in full.

We have a letter from the Investment & Securities Company, of this city, to the effect that you have given *tham* company an assignment of your rights in this matter and requesting us to give them notice of such dividend payment, whereupon they will file a copy thereof with us.

Will you please verify this arrangement with that company by return mail.

Yours very truly,

Shareholders' Agent. [141]

PLAINTIFF'S EXHIBIT No. "C"

HOTEL PFISTER

Ray Smith, Proprietor,
Harry Halfacre, Manager,
Milwaukee

May 8, 1937

Mr. L. A. Stilson Vice President
Investment & Securities Co.
Spokane Wash

Dear Mr. Stilson:—

Yours of April 28th duly came to hand. I have decided to accept the offer outlined in yours of March 29 and April 14: but again call your attention to the fact that it is my belief that the claim of the U. S. Internal Unit on my Exchange National Bank stock actually exists, rather than being in the "Might" class as you suggest.

Please prepare papers accordingly

Respectfully

JUDSON G. ROSEBUSH [142]

NOTICE OF TAX LIEN

UNITED STATES

vs.

JUDSON G. ROSEBUSH.

Form 668—Revised Oct., 1928

Treasury Department

Internal Revenue Service

Notice of Tax Lien Under Internal Revenue Laws

No. 7501

United States Internal Revenue,
District of Wisconsin

Milwaukee, Wis., December 4, 1934

Pursuant to the provisions of Section 3186 of the Revised Statutes of the United States, as amended by Section 613 of the Revenue Act of 1928 (Act of May 29, 1928, 45 Stat., 875), notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following-named taxpayer, taxes (including penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statute the amount of said taxes, together with interest, penalties, and costs that may accrue in addition thereto, is a lien in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

Name of taxpayer—Judson G. Rosebush.

Residence or place of business—117 N. Park Ave., Appleton, Wisconsin.

Nature of tax—Income Tax.

Taxable period—1928.

Amount of tax assessed—\$26,161.06.

Additional (penalty) tax assessed—Int. non-payment \$382.02; together with add'l int. @ rate of 1% per month from 4/10/34 to date of payment.

Date assessment list received—1934 Feb 15P #2.

O. A. LaBUDDE,
Collector.

Filed this 17th day of December, 1934, at 2:10 P. M. Florence E. Rogers, Clerk (or Registrar).
[143]

Certificate of Officer Authorized by Law to Take Acknowledgments.

State of Wisconsin,
County of Milwaukee—ss.

On this day personally appeared before me a Notary Public in and for the State and County aforesaid, O. A. La Budde, Collector of Internal Revenue for the district of Wisconsin, to me well known as the person who executed the foregoing instrument, and acknowledged that he executed the same for the purposes therein expressed.

In witness whereof I have hereunto set my hand and official seal, this the 4th day of December, 1934.

[Seal] C. J. LANDUSKY,
Notary Public.

My commission expires Oct. 11, 1936.

To Register of Deeds Iron County
Crystal Falls, Michigan [144]

CERTIFIED COPY OF RECORD OF NOTICE
OF TAX LIEN

State of Michigan,
County of Iron—ss.

Register's Office for the County of Iron.

I, Della Shoquist, Register of Deeds for said County, do hereby certify that I have compared the foregoing copy of Notice of Tax Lien—United States vs. Judson G. Rosebush with the Original Record thereof, now remaining in this office, and that the same is a correct Transcript therefrom, and of the whole of such Original Record.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Register of Deeds, at Crystal Falls, in said County, this 25th day of January A. D. 1943.

[Seal] DELLA SHOQUIST,
Register of Deeds. [145]

DEFENDANT'S EXHIBIT "2"

Investment and Securities Co.

Old National Bank Building

Spokane, Washington

March 29th, 1937

Mr. Judson G. Rosebush,
Appleton, Wisconsin

Dear Mr. Rosebush:

I have your letter of March 23rd, 1937, in connection with the Inland Empire Paper Company common stock. Since your recent visit to Spokane and since the receipt of your letter I have had the opportunity of discussing with our Trustees the matters which we discussed at the time you were here. A review of the circumstances would, I believe, be in order.

You will recall that under the reorganization plan of the Inland Empire Paper Company, the holders of the common stock were to turn in to the Old National Bank and Union Trust Company the certificates they then held in lieu of which there would be issued to them under the reorganization plan new certificates of common stock when the reorganization plan became effective.

In accordance with your instructions, 820 shares of the common stock of the Inland Empire Paper Company which we held as collateral to your account, and to which were attached stock powers signed by you, were turned in to the Old National Bank and Union Trust Company, but the new stock to be issued in lieu thereof was not issued at that

time. Under date of April 7th, 1936, we gave you notice by registered mail that unless your indebtedness was paid on or before April 22nd, 1936, we would sell at private sale at our office the security held to your indebtedness, including the stock of the Inland Empire Paper Company. The indebtedness was not paid and on the date set for the sale, a sale was held and the security held as collateral by us to your account was bid in by this Company, no other bidders appearing. The 820 shares of stock of the Inland Empire Paper Company were bid in for the sum of \$1.00, as at that time the affairs of that Company were so badly involved that we felt that only a nominal bid would be justified. [146]

Subsequent to April 22nd, 1936 the new stock of the Inland Empire Paper Company was issued by the Old National Bank and Union Trust Company as Trustees and we were notified that it would be delivered to us upon surrender of the receipt given when the old stock was deposited. However, we found that the stock was issued in your name as you were the recorded owner of the stock at the time of deposit and in fact were still the owner on November 25th, 1935, the date under which the new stock was issued, although it was not available for delivery until some months subsequent to that time.

We then asked you to sign stock powers to enable us to transfer to our name the new stock in the Inland Empire Paper Company. This was especially necessary as under the agreement with shareholders in which you concurred, 51% of the holdings

of each share holder was to be turned over to the Reconstruction Finance Corporation to give them voting control as long as their loan from the Reconstruction Finance Corporation was unpaid.

In reply to our request for stock powers to make the transfer, you wrote that you would not care to execute such powers, as to do so would be a ratification on your part of the validity of the sale of the 820 shares for the sum of \$1.00 which you felt was much below a fair and reasonable value of the stock at date of sale.

As I told you in our conference here, it was not our desire in taking over the title to the securities held as collateral to your account to work any undue hardship upon you by purchasing the stock at a sacrifice price. The fact that there was no known market for Inland Empire Paper Company common stock and that the company was very badly involved was the reason for our setting such a nominal price upon it in our bid. The other two stocks had a market value which could be ascertained within a reasonable degree of certainty and I believe our bids were a reasonable market price at the time of the sale.

During your visit we also discussed matters concerning your possibility of recovering upon the payment made by you on the superadded liability on stock of the Exchange National Bank. There is some indication that those who paid their assessment in full will receive a partial return on the assessment paid. If you are willing to agree to ratify the sale of your securities made on April

22nd, 1936, and are also [147] willing to assign to us as security to the balance of your indebtedness any recovery which may be made on the assessment paid on the Exchange National Bank stock, we are willing to agree with you that we will not sell the Inland Empire Paper Company common stock before April 1st, 1938, unless authorized so to do by you, and that if a sale is made subsequent to April 1st, 1938, and prior to April 1st, 1939, we will agree to give you the first opportunity to purchase the stock at the price at which we contemplate selling it and that you will have a five day period in which to elect to purchase or not to purchase before we will sell the stock to anyone else; and further, that in the event of sale before April 1st, 1939, we will credit to you on the amount you still owe us the excess of the sale price over the \$1.00 price at which we bid the stock in.

We will also agree that if we sell either the Nekoosa Edwards Paper Company stock or the Northern Paper Mills stock before April 1st, 1938, we will credit you with any amount we receive for such stock in excess of the amount at which we bid it in at the sale.

Our attorneys have advised us that in their opinion we should have a ratification of the whole of the sale, that is, not only our purchase of the Inland Empire Paper Company common stock, but also our purchase of the Nekoosa Edwards Paper Company stock and that of the Northern Paper Mills, as any question of the validity of part of

the sale might be considered as involving the validity of all of the sale. It is, of course, our position throughout this entire matter that the sale as held was valid in every way and that title to the securities rests in us, but that if you will not sign stock powers so that the stock can be transferred, it will be necessary for us to bring a suit upon your note and it is the expense and delay involved in such an action that we are endeavoring to avoid and is our reason for considering an agreement such as that outlined above.

The entire agreement is, of course, subject to the approval of the Reconstruction Finance Corporation, to whom your notes and the stocks are pledged, and I am taking the matter up with you before submitting it to them for approval, as it would be much better that we have a complete understanding before submitting it to the Reconstruction Finance Corporation, in order that their authorization to us may be absolutely definite.

In your letter of March 23rd you asked us to give you a price good for twenty days on the Inland Empire Paper Company common stock. Due to the fact that there is no regular market for this stock upon which to [148] base such a price and also because the stock is pledged to the Reconstruction Finance Corporation, it is impossible for us to give you a firm price at this time. However, if you wish to make us an offer, we will be glad to submit it to the Reconstruction Finance Corporation.

If the program as outlined above is acceptable to you, kindly so advise us that we will have the proper agreements drawn and forwarded to you for execution.

Very truly yours,

L. A. STILSON,

L. A. Stilson, Vice-President.

LAS:W [149]

DEFENDANT'S EXHIBIT "3"

April 6, 1937

Mr. L. A. Stilson, Vice President,
Investment & Securities Company,
Old National Bank Building,
Spokane, Washington.

Gentlemen:

In reference to yours of March 29, the Notice of Destraint of the United States Internal Revenue office against me still holds, so that at the moment I judge I am not a free agent to assign you my equity in the Exchange National Bank stock. In other words, I presume the Notice of Destraint will cover this as well as other assets. On the other hand, I am hoping presently to get that out of the way, but until I do, I wonder if it would not be premature to make any agreement regarding that item.

On further reflection, it seems to me perhaps the best way out of that Inland Empire Paper Company situation would be for some of us here to

get complete release of that stock from you upon payment of a certain consideration.

When I was in conference with you and Mr. Kimmel, he suggested the price of \$1.00 per share of that stock which you seemed to think was satisfactory.

On further reflection, if you are still of the same opinion, I will be glad to see if I cannot raise the money in some indirect fashion so as to get to you \$820.00 for the 820 shares in question, the understanding of course being that of that amount \$819.00 will be applied on the principal of my note.

Respectfully yours,

JGR/H [150]

DEFENDANT'S EXHIBIT 4

Investment and Securities Co.

Old National Bank Building

Spokane, Washington

April 14th, 1937

Mr. Judson G. Rosebush,

Appleton, Wisconsin

Dear Mr. Rosebush:

I have your recent letter stating that in your opinion the Federal tax lien which has been filed against you would prevent you making the assignment of your claim against the Exchange National Bank as requested in our letter of March 29th, and also requesting that we give you a firm price on the Inland Empire Paper Company stock which was taken over from you.

It is not our intention to set any price upon the Inland Empire Paper Company stock until such time as its exact status is determined, but if you desire to make a firm offer we will submit it to our Trustees and to the Reconstruction Finance Corporation for their consideration.

We have submitted to our attorneys the question of an assignment by you of your claim against the Exchange National Bank on account of the super-added liability paid on the stock and they have advised us that an assignment upon your part could be executed without any question but that it might develop that the lien of the United States Government would be prior to the lien created by the assignment, a matter which would have to be determined at a later date when, as, and if, the funds are payable on the claim against the bank. We are willing to go ahead with the program outlined in our letter of March 29th with the full understanding that the assignment of the Exchange National claim might be subject to a prior claim to the United States.

Our Trustees have had a full discussion of the entire situation concerning your indebtedness and it is our intention to immediately clarify the situation either by obtaining from you a ratification of the sale held April 22, 1936 and a transfer of the Inland Empire Paper Company stock to our name by execution on your part of stock powers, or to submit the [151] entire matter to the courts for determination. In such event, of course, we will not only ask to have the sale properly confirmed, but

will also place the balance of the debt in the form of a judgment.

We have endeavored in every way to give you every possible chance to retrieve something out of your investments, but unless we can receive your cooperation it will be necessary for us to proceed by legal methods from now on.

Will you kindly advise me immediately whether or not we may expect from you a complete and absolute ratification of the sale of securities held April 22, 1936, together with an assignment of your claim against the Exchange National Bank, subject, of course, to any liens which may exist at this time to the United States Government, in consideration of which we would agree to hold the Inland Empire Paper Company stock for one year, unless sale prior to that time is consented to by you; and we would further agree that if the stock is sold any time prior to April 1st, 1939, to give you credit on your remaining indebtedness for any excess of the sale price over the price at which the stock was bid in by us; and would also agree that if the other securities taken over from you are sold before April 1st, 1938, we would credit you with any amount we receive for the stock in excess of the amount at which it was bid in at the sale.

The above would, of course, all be subject to the approval of the Reconstruction Finance Corporation.

If you are not willing to enter into such an agreement, kindly so advise us immediately and we will take such other course as apparently is indicated.

Very truly yours,

L. A. STILSON,

L. A. Stilson, Vice-President.

LAS:W [152]

DEFENDANT'S EXHIBIT 5

April 20, 1937

Mr. L. A. Stilson, Vice Pres.,
Investment & Securities Co.,
Old National Bank Building
Spokane, Washington.

Dear Mr. Stilson:

Replying to yours of April 14, I think we would made the most headway if, in harmony with your suggestion, we would make you a firm offer on the 820 shares of Inland Empire Paper Company stock you are holding. Accordingly, in line with our personal conversation I will raise \$820.00 in cash and offer that amount for the aforesaid 820 shares of Inland Empire Paper Company common stock, the understanding of course, being that \$819.00 of that amount shall be applied on my direct indebtedness since, as I understand it, when you bid the stock in you bid the total block in at \$1.00.

If we get this matter out of the way first, that will simplify our problem considerably, and I would

then be glad to discuss with you the balance of the matter referred to in your letter.

Respectfully yours,

JGR/H [153]

DEFENDANT'S EXHIBIT "6"

Investment and Securities Co.
Old National Bank Building
Spokane, Washington
June 2, 1937

Mr. Judson G. Rosebush
Appleton, Wisconsin

Dear Mr. Rosebush:

Our attorneys have prepared an agreement in accordance with our understanding with you concerning your indebtedness and the securities formerly pledged thereto. I am enclosing one copy of this agreement which has not as yet been executed. Will you kindly go over this and if it meets with your approval advise me at once and I will then refer it to the Reconstruction Finance Corporation for their approval. I am sending it to you before submitting it to the Reconstruction Finance Corporation so that should any changes be necessary they may be made before the approval of the Reconstruction Finance Corporation is obtained, which will obviate any possibility of our having to go back to them for a second approval.

In connection with your recent letter concerning the sale of the Inland Empire Paper Company

stock to you at this time, I do not believe that our trustees would be in favor of such a sale at any price that you would consider reasonable. The greatly improved earning position of the company during the past few months indicates that in the near future a much higher price for their securities might be justified and it is our opinion that the stock should not be sold at this time.

Kindly let me hear from you in connection with the approval of the agreement as soon as possible as it will take a little while to obtain the approval of the Reconstruction Finance Corporation.

Very truly yours,

L. A. STILSON,

L. A. Stilson, Vice President.

LAS:mbj

Enc. [154]

DEFENDANT'S EXHIBIT "7"

June 11, 1937

Mr. L. A. Stilson, Vice President
Investment & Securities Co.,
Old National Bank Building,
Spokane, Washington.

Dear Mr. Stilson:

In reply to yours of June 2, the agreement enclosed seems to be satisfactory, except that on page 3 you have not made note of the fact that the United States Internal Revenue Department has a lien prior to yours. That has been covered by our correspond-

ence, but it seems to me it ought to be included in the agreement.

Then, on page 4 you speak about a five day period. If you will analyze this, you will see that practically speaking, it only gives me a day or so on account of the time which the mail takes. I wonder if you would not substantially lengthen this period.

Respectfully yours,

JGR/H [155]

DEFENDANT'S EXHIBIT 8

Investment and Securities Co.

Old National Bank Building

Spokane, Washington

June 16, 1937

Mr. Judson G. Rosebush

Appleton, Wisconsin

Dear Mr. Rosebush:

I have your letter of June 11, 1937, in which you state that the agreement which we submitted to you is satisfactory with the exception that you feel that a statement should be inserted that the United States Internal Revenue Department has a prior lien on your claim against the Exchange National Bank.

I have discussed this with our attorneys and they feel that such a citation in the agreement would be out of order as it has not yet been definitely determined whether or not their lien would be prior

to a proper assignment. This would be a matter that would have to be settled when, as, and if a disbursement would be made on the Exchange National claim. Due to the fact that we have notice of the lien of the government and the nature of the lien, our attorneys feel that the agreement should be satisfactory without such a statement as there could not possibly be any contention on our part that you had or were misrepresenting the status of the claim.

In connection with the time allowed in case of a sale of the stock of the Inland Empire Paper Company, our trustees are not willing to enter into any agreement that would contemplate a longer time for you to exercise the option to purchase. You will note in the contract that the notice would be sent to you by air mail, which would give you approximately three days in which to reply, and it was our opinion to extend the time longer might make it difficult for us to deal with the stock. We would, of course, endeavor to give you as much notice as could be given reasonably, but we could not agree to a period of longer than five days as set forth in the contract. [156]

I trust that the above will explain our position and that you will let me hear from you approving the contract as submitted as the Reconstruction Finance Corporation is becoming very pressing in their requirement that the status of the Inland Empire Paper Company stock be definitely determined and, we will not be able to submit this contract to

them until it is ready in definite form for their approval.

Very truly yours,

L. A. STILSON,

L. A. Stilson, Vice President.

LAS:mbj [157]

DEFENDANT'S EXHIBIT "9"

June 21, 1937

Mr. L. A. Stilson, Vice President,
Investment & Securities Company,
Spokane, Washington.

Dear Mr. Stilson:

Yours of June 16 is at hand. In reference to your second paragraph, I think that the agreement as drafted involves me in no possible misunderstanding so far as your Company is concerned, since from the start of these negotiations, you have had notice of the Tax Lien.

My fear on that matter arises from the fact that the Notice of Destraint set forth that I was not to transfer any more of my property until that Tax was paid, so that if I make the agreement with you as you have drafted it, I am, on the face of it, disregarding a notice of the Federal Internal Revenue Unit.

It seems to me, therefore, for my own protection as regards the Internal Revenue Unit, you should either redraft the agreement so that the Unit could not hereafter claim that I had violated their order;

or, if you do not want to do that, I should then present your proposed agreement to the Internal Revenue Unit, see if they were willing to let it stand as now drafted.

As you can clearly see from the above, I have a tremendous respect for the power of the United States government, and do not willingly want to run afoul of that power.

Respectfully yours,

JGR/H [158]

DEFENDANT'S EXHIBIT "10"

Investment and Securities Co.

Old National Bank Building

Spokane, Washington

June 30, 1937

Mr. Judson G. Rosebush

Appleton, Wisconsin

Dear Mr. Rosebush:

Your letter of June 21st addressed to our Mr. Stilson, has been referred to the undersigned inasmuch as Mr. Stilson is away on a vacation at the present time.

Our attorneys have rewritten the agreement to show that the Collector of Internal Revenue has filed an Order of Distraint, and therefore the assignment to this company is subsequent and junior to any lien that the Collector of Internal Revenue may have acquired by reason of said order.

We are enclosing herewith two complete copies of the agreement, together with sheets three and four to be substituted in the copy you now have. When this has been done, we would like to have you sign all three copies and return them to us for signature. As soon thereafter as the agreement has been approved by the Reconstruction Finance Corporation one signed copy will be returned to you.

Very truly yours,

GEO L. KIMMEL,

GLK:mbj

Secretary. [159]

DEFENDANT'S EXHIBIT "11"

Investment and Securities Co.

Old National Bank Building

Spokane, Washington

July 21, 1937

Mr. Judson G. Rosebush

Appleton, Wisconsin

Dear Mr. Rosebush:

When we submitted to the Reconstruction Finance Corporation the agreement which was approved by you, their Washington office requested that there be inserted in the agreement the statement that fifty-one percent of the Inland Empire Paper Company common stock is subject to the pledge for the purpose of giving voting rights to the Reconstruction Finance Corporation. We have, therefore, redrawn the agreement and have inserted on pages four and five a paragraph complying with their request.

They have also requested that a separate assignment covering your claim against the Exchange National Bank be executed and specifically stated that in this assignment no mention should be made of the claim of the Bureau of Internal Revenue inasmuch as they expect to file this with the liquidating agent of the Exchange National Bank and the matter of the claim of the Bureau of Internal Revenue is fully covered in the agreement.

It is also our attorney's opinion that your Exchange National Bank stock certificates should be endorsed and forwarded to us. Very probably when, as, and if any payments are made by the liquidating agent he will wish to have these certificates presented to him and we should, therefore, have them available.

We are enclosing three copies of the agreement and three copies of the assignment which has been prepared by our attorneys and request that you execute these and return them to us. As soon as we have executed them and obtained the approval of the Reconstruction Finance Corporation, a copy of each will be returned to you for your records.

We would appreciate receiving these, duly executed, together with the stock certificates, at as early a date as possible so that we may get this matter cleared with the Reconstruction Finance Corporation.

Very truly yours,

L. A. STILSON

L. A. Stilson,

LAS:mbj Encs.

Vice President [160]

DEFENDANT'S EXHIBIT 12

July 27, 1937

Mr. L. A. Stilson, Vice President,
Investment & Securities Company,
Old National Bank Building,
Spokane, Washington.

Dear Mr. Stilson:

July

Replying to yours of ~~June~~ 21, the modification suggested in your first paragraph is satisfactory, and I have accordingly signed the three documents and return same herewith.

Regarding the matter of a separate assignment in which no mention is made of the claim of the Bureau of Internal Revenue, and the request of your attorney that the Exchange National stock Certificate be sent you, I am sorry to say that both these requests, in my opinion, are absolutely contrary ~~worthy~~ to the Notice of Destraint which the Internal Revenue Department filed against me, for the assignment stands as an independent document and makes no specific reference to the agreement under which the Claim of the Internal Revenue Department is given priority; and, moreover, the Notice of Destraint prohibits me from turning over any of my stock certificates to anyone until their claim is liquidated.

Now, of course, I may be in error on both of these matters and, accordingly, I am entirely willing to send the documents enclosed in yours of July 21 to the Collector of Internal Revenue in Milwaukee to see if I can sign the assignments; and if he says I

can do so, then I will do so. Accordingly, I await your advice on these two matters.

Will you kindly cancel my original and return the agreement of which the enclosed is a substitute.

Respectfully yours,

JGR/H

Enc. [161]

DEFENDANT'S EXHIBIT "13"

July 9, 1937

Mr. Geo. L. Kimmel, Secretary,
Investment & Securities Company
Old National Bank Building,
Spokane, Washington

Dear Mr. Kimmel:

In compliance with yours of June 30, I have inserted the pages you suggested and I am returning herewith the three documents properly signed and acknowledged.

I notice that in the old copy you had, on page 4, the words "air mail" inserted, so I have put that into the copies I am returning herewith.

Respectfully yours,

JGR/H

Enc. [162]

DEFENDANT'S EXHIBIT 14

These were the two rejected sheets (pencil)
as collateral security to the obligations of the Pledg-

er, at the prices named and the application of the proceeds thereof, as follows:

Applied on Note in the principal amount of Twenty-five Thousand Dollars (\$25,000.00), dated November 30, 1932, the proceeds of:

325 shares of Nekoosa-Edwards Paper Com-	
pany common stock at \$30.00 per share,....	\$ 9,750.00
600 shares of Northern Paper Mills com-	
mon stock at \$10.00 per share,.....	6,000.00

Total credited to above Note,.....	\$15,750.00
------------------------------------	-------------

Applied on Note in the principal amount of Seventy-five Thousand Dollars (\$75,000.00), dated December 19, 1932, the proceeds of:

750 shares of Northern Paper Mills com-	
mon stock at \$10.00 per share,.....	\$ 7,500.00
820 shares of Inland Empire Paper Com-	
pany common at	1.00

Total credited to above Note,.....	\$ 7,501.00;
------------------------------------	--------------

The party of the second part further agrees to and does hereby assign to party of the first part as security to the balance of indebtedness owing by the party of the second part to party of the first part any recovery which may be made by or on behalf of party of the second part from or on account of an assessment paid on stock of Exchange National Bank, Spokane, Washington, and further of the first part agrees to make, execute and deliver to party any further instruments or documents necessary, needful and proper to make this assignment for collateral purposes effective and to enable party of the first part to recover any amounts which may or shall be due by reason of the payment of such assessments on said Exchange National Bank stock.

In consideration of the foregoing, the party of the first part agrees that no sale of all or any part of said 820 shares of Inland Empire Paper Company common stock shall be made before April 1, 1938, unless consented to by party of the second part; that if any sale of said stock shall be made subsequent to April 1, 1938, and prior to April 1, 1939, the party of the first part will give and grant unto party of the second part an opportunity to purchase all or any part of said 820 shares of Inland Empire Paper Company stock at the price at which party [163] of the first part shall contemplate selling it, and that party of the second part shall have a five day period to elect to purchase or not to purchase all or any part of said stock, during which five day period the party of the first part will not sell the stock to anyone else. Said five day period shall begin with the date and time of depositing a letter, full first class airmail postage prepared, in the United States mails, addressed to the last known address of party of the second part, and it is expressly understood that if party of the second part shall decide to accept the offer of sale so given by the Company he will at once communicate his acceptance by telegram or telephone to the Company and will forward bank draft or cashier's check in full payment thereof at once, so that said bank draft or cashier's check shall be in the hands of the Company not later than five days after the expiration of the first five day period during which the offer shall be accepted. Following the expiration of said first five day period if said offer shall not be accepted, or the expiration of five

days thereafter, if said offer shall be accepted but payment shall not be received within said last five day period, the Company shall be under no further duty to withhold said stock from the market and may sell said stock free and discharged of any of the terms and provisions of this Agreement.

It is further understood and agreed that in the event of the sale of all or any part of said 820 shares of Inland Empire Paper Company common stock on or before April 1, 1939, the Company will credit upon the indebtedness of the party of the second part the excess of the sale price of all or any part of said stock over [164]

DEFENDANT'S EXHIBIT 15

(Copy)

Stocks—Mortgages—Farms—and—Timber Lands
PATTEN Judson G. Rosebush, President
FINE Judson G. Rosebush, Jr., Secretary
PAPERS

Incorporated Appleton, Wisconsin
June 16, 1940

Mr. Charles P. Robbins
Shareholders' Agent
Spokane, Wash.

Dear Mr. Robbins:—

Yours of June 10 was forwarded to me away from home.

There is outstanding against me a very large claim of U. S. Internal Revenue Unit for income taxes which has not yet been settled or compromised, and they hold that this claim is a claim prior to all other claims upon my assets, except such as were hypothecated before their claim was filed.

After this claim was filed and covered by a Notice of Dstraint, I made an agreement with Investment & Securities Company assigning them my claim to dividends from Exchange National Bank, but specifically setting forth in said agreement that this assignment by me was junior to any claim of U. S. Internal Revenue Unit, as above, to said dividends.

I am agreeable to having the Investment and Securities Co. give you a copy of this agreement, wherein you will find set forth the junior character of their claim.

I have steadily maintained with Investment and Securities Company the position that this assignment of my dividend rights to Exchange Nat. Bank stock was valueless, until and unless the prior claim of Gov. was satisfied. That is my position now.

Respectfully,

(Signed) JUDSON G. ROSEBUSH

P. S. Please advise in due course what you do on the matter. My own wish is that you issue and hold my check, pending settlement of above matters.
J. G. R. [165]

DEFENDANT'S EXHIBIT—16-E

(Copy)

Form 17A—Rev. Oct. 1935

Treasury Department

Internal Revenue Service

NOTICE AND DEMAND FOR INCOME TAX

Notice is hereby given that there has been assessed against you the amount of tax stated below. Demand is hereby made for the immediate payment of said tax. If payment is not made within ten days after date of this notice, interest will accrue at the rate of 6 percent per annum from the date shown below until the tax is paid.

Date Feb-27-1934

GPO 2—9487

To avoid interest at the rate of 6 percent per annum this tax must be paid within ten days from the date of this notice and demand to the Collector of Internal Revenue, at Milwaukee, Wisconsin.

Old Balance	Date	Tax	Amount Paid	Balance Payable
Assessed	Tax	21345.84		
2/9/34	Int	6278.01		
	2/28/34		1199.62-Cr	26,161.06
	4/10/34		263.17-Cr.	

Remarks

1934 Feb 15P #2

yr. 1928 Income 272B RAR

Collector's Paid Stamp

Date.....

Judson G. Rosebush
117 N Park Avenue
Appleton Wisconsin

To The Collector of Internal Revenue:
I enclose herewith the sum of \$.....
in payment of the tax shown above.

Name.....

Address.....

Return This Form With Remittance

DEFENDANT'S EXHIBIT 16-F

Form 21 A

Copy

Treasury Department

SECOND NOTICE AND DEMAND

Internal Revenue Service

FOR INCOME TAX

Revised Jan. 1936

Balance Forward	Date	Charge	Last Credit	Unpaid Balance
Assessed	Tax	21345.84		
2/9/34	Int	6278.01		
	2/28/34		1199.62-Cr.	26,161.06
	4/10/34		263.17-Cr.	

Account Number and Remarks

1934 Feb-15P #2

yr. 1928 Income 272B

RAR

Collector's Paid Stamp

Date of First Notice:

2/27/34

Date of This Notice:

3/23/34

Judson G Rosebush

117 N Park Avenue

Appleton Wisconsin

The records of this office indicate that you are delinquent in making payment of the unpaid balance of tax and/or interest shown above.

It therefore becomes my duty to demand that this unpaid balance be paid, together with interest computed at the rate of 6 per cent per annum from the date prescribed for its payment to the date of payment, which interest has been incurred by failure to pay the unpaid balance within the prescribed time. If payment of the amount due to Government is not received within ten days from the date of this notice and demand, the Law provides that collection with costs may be made, if necessary, by seizure and sale of property.

Please return this notice or a copy thereof with your remittance to the

Collector of Internal Revenue at Milwaukee Wisconsin

Unpaid balance	\$26,161.06
Delinquency interest computed from 2/27/34 to	
4/10/34	382.02

Total unpaid balance and interest thereon due as
of the date indicated above\$26,543.08

(Signed) O. A. LA BUDDE
Collector of Internal Revenue.

U. S. Government Printing Office 16—15761 [167]

DEFENDANT'S EXHIBIT 16-G

Form 69

Treasury Department

Internal Revenue Service

Revised May 1939

Copy

No. 31365

WARRANT FOR DISTRRAINT

Balance Forward	Date	Charge	Last Credit	Unpaid Balance
Assessed	Tax	21345.84		
2/9/34	Int	6278.01		
	2/28/34		1199.62-Cr.	26161.06
	4/10/34		263.17-Cr.	

Account Number and Remarks

1934 Feb 15P #2

yr 1928 Income 272B RAR

Judson G. Rosebush

117-N Park Avenue

Appleton Wisconsin

Date of First Notice:

2/27/34

Date of Second Notice:

3/23/34

To, Deputy Collector.

Whereas, in pursuance of the provisions of the Acts of Congress relating to internal revenue the above-named person or persons is or are liable to pay the tax or taxes assessed against him, or them,

in the amount or amounts named hereinbelow, together with penalties and interest prescribed by law for failure to pay said tax or taxes when the same became due; And Whereas, ten days have elapsed since notice was served and demand made upon said person or persons for payment of said tax or taxes; And Whereas, said person or persons still neglect or refuse to pay the same: You are hereby commanded to levy upon, by distraint, and to sell so much of the goods, chattels, effects, or other property or rights to property, including stocks, securities, and evidences of debt, of the person or persons liable as aforesaid, or on which a lien exists for the tax or taxes, as may be necessary to satisfy the tax or taxes, with such additional amounts, including interest, as are shown in the statement below, and also such further sum as shall be sufficient for the fees, costs, and expenses of the levy; but if sufficient goods, chattels, or effects are not found, then you are hereby commanded to seize and sell in the manner prescribed by law so much of the real estate of said person or persons, or on which a lien exists for the tax or taxes, as may be necessary for the purposes aforesaid. You will do all things necessary to be done in the premises and strictly comply with all requirements of law, and for so doing this shall be your warrant, of which make due return to me at this office on or before the sixtieth day after the execution hereof. [168]

Collect 50c Additional to cover costs of
Collection

Unpaid balance	\$26,161.06
Penalty of 5 per centum	
Delinquency interest computed from 2/27/34 to 4/10/34	382.02

Total tax, penalty, and interest due on date of second notice	\$26,543.08
Amount of additional interest due from date of sec- ond notice	

Witness my hand and official seal at Milwaukee,
Wis. this 14th day of April, 1934

Interest to be computed on \$26161.06 at rate of
 $\frac{1}{2}$ of 1% per month to actual date of payment.
From 4/10/34

(Signed) O. A. LA BUDDE

Collector of Internal Revenue.

Internal Revenue Collection District of Wiscon-
sin

U. S. Government Printing Office 2—1376

F-668 4/16/34

[169]

DEFENDANT'S EXHIBIT 16-H

Treasury Department
Internal Revenue Service
Milwaukee, Wis.

April 17, 1934.

Office of the Collector
District of Wisconsin
In Reply Refer to

FO*JFA

Received
(Illegible)

D. W. No. 31365

Judson G. Rosebush,
117 N. Park Avenue,
Appleton, Wis.

The Commissioner of Internal Revenue has made an assessment against you amounting to ~~\$26689.56~~. Notice of this assessment has been given you and demand for its payment has been made upon you. Because of your failure to pay the amount due, the Collector of Internal Revenue for the District of Wisconsin has issued a Warrant of Distrainment directing me to seize and sell so much of your property as will pay the amount assessed plus interest from the date assessed at one per cent per month to date of payment.

If the amount now due, ~~\$26689.56~~, is paid on or

27

before ~~April 17, 1934~~, it will obviate the necessity of seizing and selling your property as directed by the Warrant of Distrainment.

Make remittance payable to the Collector of In-

ternal Revenue and forward to Chief of Field Division, Internal Revenue Department, Room 210 Federal Building, Milwaukee, Wisconsin. Return this letter with remittance.

Mim. #1140

Chief of Field Division.

[170]

DEFENDANT'S EXHIBIT 16-I

Form 668—Revised May 1939

(Copy)

Treasury Department

Internal Revenue Service

NOTICE OF TAX LIEN UNDER INTERNAL
REVENUE LAWS

No. 7501

United States Internal Revenue,

.....District of Wisconsin

Milwaukee, Wis., April 16, 1934

Pursuant to the provisions of Sections 3670, 3671, and 3672 of the Internal Revenue Code of the United States, notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following-named taxpayer, taxes (including interest and penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statutes the amount of said taxes, together with penalties, interest, and costs that may accrue in addition thereto, is a lien in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

Name of taxpayer—Judson G. Rosebush
Residence or place of business—117 N. Park Ave.,
Appleton, Wisconsin
Nature of tax—Income Tax
Taxable period—1928
Amount of tax assessed—\$26,161.06
Additional (penalty) tax assessed Int. non-payment
\$382.02; together with add'l int. : rate of 1%
per month from 4/10/34 to date of payment.
Date assessment list received 1934 Feb 15P #2
19.....

O. A. LA BUDDE

Collector.

Certificate of Officer Authorized by Law
to Take Acknowledgments

State of Wisconsin

County of Milwaukee—ss:

On this day personally appeared before me a
Notary Public in and for the State and County
(Official Title)

aforesaid, O. A. La Budde Collector of Internal
Revenue for the district of Wisconsin to
me well known as the person who executed the fore-
going instrument, and acknowledged that he exe-
cuted the same for the purposes therein expressed.

In witness whereof I have hereunto set my hand
and official seal, [171] this the 16th day of April,
1934

[Seal]

WM. RUGGABER

Notary Public

[Seal]

(Official Title)

My commission expires Mar. 27, 1938

To Clerk of U. S. District Court
Milwaukee, Wisconsin

Exhibit I

U. S. Dist. Court, East. Dist. of Wis. Filed Apr
19 1934 at 10 o'clock A. M. B. H. Westfahl, Clerk.

(Clerk's Note: Here follows Internal Revenue Code Chapter 36, Sub-chapter B—Lien for Taxes and Instructions which are omitted.)

DEFENDANT'S EXHIBIT 16-J

(Clerk's Note: Defendant's exhibit 16-J is the same as Defendant's exhibit 16-I except that it was sent to Register of Deeds Appleton, Wisconsin, and is endorsed as follows: State of Wisconsin Outagamie County Received and Filed Apr 20 1934 at 8 o'clock A. M. A. G. Koch Register) [172]

DEFENDANT'S EXHIBIT 16-K

Copy

Patten Paper Company,
Appleton, Wisconsin

April 30, 1934.

Miss Ethel M. Hillburg,
Deputy Collector of Internal Revenue,
Appleton, Wisconsin.

Dear Miss Hillburg:

In harmony with arrangements made last Thurs-

day with Mr. O. A. LaBudde, Collector of Internal Revenue of this district, I am handing you herewith our check for \$100.00 to apply on assessment made by the Commissioner of Internal Revenue on February 27, 1934, amounting to \$26,424.23.

Respectfully yours,

JUDSON G. ROSEBUSH.

JGR:K

DEFENDANT'S EXHIBIT 16-L

Copy

Patten Paper Company,
Appleton, Wisconsin.

July 2, 1934.

Miss Ethel M. Hillburg,
Deputy, Collector of Internal Revenue,
Appleton, Wisconsin.

Dear Miss Hillburg:

I am enclosing herewith check for \$100.00 which is the June payment on income tax levied against our 1928 income.

Respectfully yours,

JUDSON G. ROSEBUSH

JGR:K

Enc. [173]

DEFENDANT'S EXHIBIT 16-M

Form 668—A—Dec., 1922

Treasury Department

Internal Revenue Service

NOTICE OF LEVY

United States of America,
Wisconsin Collection District,
State of Wisconsin

To Barbara J. McNaughton Rosebush

(Name of bank with which taxpayer has money
on deposit)

At Appleton, Wis.

You are hereby notified that there is now due, owing, and unpaid from Judson G. Rosebush to the United States of America the sum of Twenty-nine thousand five hundred twenty-seven & 72/100 dollars (\$29,527.72) as and for an internal revenue tax.

You are further notified that all property and rights to property now in your possession and belonging to the aforesaid Judson G. Rosebush, and all sums of money owing from you to the said Judson G. Rosebush are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the sum of Twenty-nine thousand five hundred twenty-seven & 72/100 dollars (\$29,527.72) of the amount now owing from you to the said Judson G. Rosebush or for such lesser

sum as you may be indebted to him, to be applied in payment of the said tax liability.

Dated at Appleton, Wisconsin this 16 day of December, 1935. Interest to be computed at the rate of 6% per annum from November 21, 1935.

GUY J. JOHNSON

Deputy Collector of Internal
Revenue.

Government Printing Office 2—12503 [174]

DEFENDANT'S EXHIBIT 16-N

(Clerk's Note: Defendant's Exhibit 16-N is a copy of Defendant's Exhibit 16-G.)

DEFENDANT'S EXHIBIT 16-O

(Clerk's Note: Defendant's Exhibit 16-O is identical with Defendant's Exhibit 16-I except that it is not endorsed with the filing mark in the Clerk's Office.)

DEFENDANT'S EXHIBIT 16-P

(Defendant's Exhibit 16-P is identical to Defendant's Exhibit 16-J except that it is not endorsed with the filing mark of the Register of deeds.) [175]

DEFENDANT'S EXHIBIT 16-Q

Treasury Department

Internal Revenue Service

Office of Collector

District:

Wisconsin

December 16, 1935

To Barbara J. McNaughton Rosebush

Appleton, Wisconsin

Demand is hereby made upon you for the surrender to me or my deputy serving this notice of the following described property:

Certificate #111	Patten Paper Co.	100 shares
" 118	" " "	25 "
" 130	" " "	50 "
" 133	" " "	5 "
" 136	" " "	5 "
" 138	" " "	60 "
" 140	" " "	25 "
" 141	" " "	50 "
" 142	" " "	50 "
" 179	" " "	91 "

which have now been transferred to your name by new certificate #197 for 461 shares,

Certificate #102	Outagamie Paper Co.	100 shares
" 116	" " "	50 "
" 126	" " "	50 "
" 127	" " "	50 "
" 128	" " "	50 "

which have now been transferred to your name by new certificate #138 for 300 shares,

Certificate #5	Rosebush Brothers Inc.	50 shares
" 9	" " "	12½ shares

which have now been transferred to your name by new certificate #22 for 62½ shares.

Certificate #C62 Wood County National Bank, 7½ shares, which have now been transferred to your name by Certificate #C99 for a like number of shares;

Certificate #117 State Bank of Florence, 5 shares, which have now been transferred to your name by new certificate #194 for a like number of shares, all of which property formerly belonged to Judson G. Rosebush of Appleton, Wisconsin, and which was accepted by you from him subsequent to April 16, 1934, on which date a lien was duly filed by the Collector of Internal Revenue for the District of Wisconsin against said Judson G. Rosebush for an internal revenue tax, then due and owing by him to the United States. Failure to comply with this demand within five days from the date of service will be deemed a refusal.

GUY J. JOHNSON

Collector of Internal Revenue for the District of
Wisconsin

Served on Barbara J. McNaughton Rosebush at 2:15 P. M. on December 16, 1935 by Guy J. Johnson
Deputy Collector [176]

DEFENDANT'S EXHIBIT 16-R

Know All Men by These Presents

That I, Barbara J. McNaughton Rosebush, of the City of Appleton, in the county of Outagamie,

State of Wisconsin, have made, constituted and appointed, and by these presents do make, constitute and appoint Judson G. Rosebush, (my husband), of the city of Appleton, in the County of Outagamie, and state of Wisconsin, my true and lawful attorney, for me and in my name, place and stead, to represent me at any and all meetings, general and special, of the stockholders of any and all corporations wherein I now or may hereafter hold stock, and for me and in my name and stead to vote my stock and otherwise to act as my proxy, at all such meetings as shall hereafter be held, from time to time, for all purposes that may or shall come before such meetings, granting to my said attorney all of the powers I might or should possess if personally present at such meetings, and for that purpose to sign and execute any proxies or other instruments in my name and on my behalf; also granting to my said attorney full power and authority for me and in my name to collect, receive, and receipt for any and all dividends which shall at any time, and from time to time, be payable to me upon said stock and shares of stock, and to execute in my name and stead any and all writings in connection with and relating to said stock that he may see fit, also to assign, sell, or hypothecate any of said stock and to purchase any new stock in said corporations or any other corporations, in my name and stead, using my funds therefor, the same as I might or could do if personally present; also, in my name and stead, to negotiate for, grant, bargain, sell, lease and mortgage, any and all lands, real

estate, tenements, and hereditaments, in whole or in pieces or parcels, that I may own, possess or have any interest in, wheresoever situated, whether within or without the State of Wisconsin, also all lands, tenements and hereditaments of which I may hereafter become seized or possessed, from time to time, and at any times, and for such prices, and upon such terms and conditions as my said attorney may in his discretion see fit; and for the purpose of carrying out the foregoing and following acts, my said attorney is hereby empowered to execute, acknowledge, and deliver, in my name [177] and stead, all deeds of conveyance, with or without covenants of warranty, mortgages, satisfactions of mortgages, leases, contracts, promissory notes, and any other instruments of writing, including the release of dower and homestead rights, the same as I might or could do if personally present; also, in my name and stead to invest or otherwise disburse all or any of my moneys that may come to his possession from any source whatsoever; also, in my name and stead, to demand, sue for, at law or in equity, and collect, and give receipts for payments made upon, any and all debts, rights, accounts and demands due or to become due to me; also giving and granting unto my said attorney full power and authority, for me and in my name to take and receive any promissory note and notes secured by real estate mortgage or mortgages, or otherwise (or without security) on or for any sale or sales of my property or for any other purpose, and

to execute, acknowledge and deliver in my name proper and sufficient releases of mortgages and to accept in my name, releases of mortgages now standing or hereafter standing in my name; I also empower my said attorney to borrow money in my name and stead, at such times, in such sums, and under such terms and conditions as he in his discretion may see fit, and to execute promissory notes in my name and to evidence and bind me and my estate upon such loans, and to deposit and hypothecate, upon such terms and in such amounts as he sees fit, any securities belonging to me to secure and as collateral to such loans. I also hereby empower my said attorney to sign checks in my name and withdraw any portion of my funds, in such amounts and at such times as he sees fit, from whatever bank any of my funds may be on deposit; and I hereby direct that any bank wherein I have funds on deposit, or may hereafter have funds on deposit, shall honor all checks signed in my name by my said attorney; giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about said premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying all that my said attorney, or his substitute, shall lawfully do or cause to be done by virtue thereof.

And whereas by a power of attorney, dated May 18th, 1908, under my hand and seal, I, as Barbara

Jane McNaughton, appointed John McNaughton (my father) to be my attorney, with the powers and authorities [178] therein mentioned, and whereas said John McNaughton died on the 16th day of April, 1910.

Now therefore, I do hereby revoke said power of attorney to said John McNaughton; provided always that this revocation shall not prejudice or affect anything done or caused to be done by the said John McNaughton, or any substitute acting under him, in the exercise of any powers or authorities enumerated thereunder up to the date of this revocation.

In Witness Whereof, I have hereunto set my hand and seal, the 28th day of May, A. D. 1910.

[Seal]

BARBARA J. McNAUGHTON
ROSEBUSH

In the presence of

C. S. DICKINSON

P. L. SCHNELLER

State of Wisconsin,
Outagamie County,—ss.

Personally came before me, this 28th day of May, A. D. 1910, the above named Barbara J. McNaughton Rosebush, to me known to be the person who executed the foregoing instrument, and acknowledged the same.

[Notarial Seal] CHARLES S. DICKINSON,

Notary Public, Outagamie County, Wisconsin.

My commission expires Sept. 28-1913.

State of Wisconsin,
Outagamie County.—ss.

I, B. J. Zuehlke Register of Deeds in and for the County and State aforesaid, do hereby certify, that I have duly compared the foregoing and annexed copy of a Power of Attorney with the original record thereof as recorded in my said office, on the 16 day of June A. D. 1910 at 2 o'clock P. M., in Volume 136 of Deeds on page 272 and that the same is at a correct transcript therefrom, and of the whole thereof.

In Testimony whereof, I have hereunto set my hand and affixed the seal of my said office at Appleton, this 13 day of May A. D. 1911

[Seal]

B. J. ZUEHLKE

Register. [179]

[Title of Court and Cause.]

OPINION OF THE COURT

Schwellenbach, District Judge [180]

This case involves that portion of the controversy concerning the tax problems of Judson G. Rosebush of which disposition was not made in the case of *United States vs. Rosebush*, 45 Fed. Supp. 664. In that opinion will be found a statement concerning the tax and assessment involved here. The assessment appeared on the Commissioner's list which was received by the Collector

of Internal Revenue at Milwaukee, Wisconsin, on February 18, 1934. Demand for payment was made on February 27, 1934.

This action was commenced by Charles P. Robbins, Shareholders Agent for the shareholders of the Exchange National Bank of Spokane, Washington. It is in the nature of an interpleader. Robbins has deposited in this Court sixty-five hundred dollars (\$6,500) being the amount of Rosebush's share of the dividends on account of assessments paid by him on his shares in the Exchange National Bank, a national banking association which, in 1928, became insolvent and which assessments were paid by him in 1929. The record discloses that Robbins was appointed as Shareholders Agent in 1936 after all creditors of the insolvent bank had been paid in full and that since that date Robbins has liquidated all of the assets then turned over to him by the Receiver of the insolvent bank. Rosebush and his wife, Barbara McNaughton Rosebush, were joined as parties in this action and were both served with process. Neither of them appeared and defaults have been entered against them.

The Investment and Securities Company, a Washington corporation, intervened in the action and asserted its claim to the fund on the basis of an assignment to it on July 27, 1937, by which Rosebush pledged any recovery to which he might be entitled as security for the balance of the indebtedness due by Rosebush to Investment and Security Company (hereafter called the Intervenor.) The correspondence leading up to the assignment

and the assignment itself clearly show that [181] it was made with knowledge of the asserted lien by the United States for taxes. The assignment itself specifically stated that it was subsequent and junior to such lien if one existed. It is conceded that the Intervenor filed notice of the assignment with Robbins on March 14, 1938.

The United States and Frank J. Kuhl, Collector of Internal Revenue for Wisconsin, have both appeared and they both assert the right of the Government to this money on the basis of the claim of tax lien and also on the basis of a writ of fieri facias issued out of the United States District Court for the Eastern District of Wisconsin November 27, 1941, by virtue of a judgment in favor of the United States against Rosebush in the amount of \$37,220.85, for the taxes noted in the Commissioner's assessment list in 1943.

Since whatever right the Intervenor acquired under the assignment of July 27, 1937, was junior and inferior to a tax lien of the Government, the primary question in this case is whether, on that date, the Government had a lien against the right which Rosebush assigned to the Intervenor. Intervenor alleges in its complaint and contends in its brief that, if the Government had a lien, such lien was ineffective as to it because of the failure to file notice of the lien in the State of Washington. The Intervenor contends that the situs of the property was here and that it, as pledgee, acquired a right superior to that of the Government. The error in this reasoning by the Intervenor arises from the

fact that, (in 1937, Section 1562 of the Internal Revenue Code (now Title 26 U.S.C.A. Sec 3672 applied only as to a mortgagee, purchaser or judgment creditor. The word "pledgee" was not inserted until the act was amended on June 29, 1939, 53 Stat. 882, which amended the Internal Revenue Code of 1939, 53 Stat. 449. At no place does the 1936 Revenue Act refer to this question. (See Report, Ways and Means Committee, House of Representatives, 76th Cong. 1st Session, #855, p. 25 and 26; Report, Finance Committee, U. S. Senate, 76th Cong. 1st Ses- [182] sion, #648, p. 10; Congressional Record, Vol. 84, pt. 7, p. 7482, 7500.) Intervenor's error in this regard no doubt results from the fact that the historical note following 26 U.S.C.A. Sec. 3672, refers to an amendment of June 25, 1936, ch. 804, 49 Stat. 1921, which is erroneous. The chapter and page refer to an amendment dealing with the name of the District Court for the District of Columbia. The retroactive features of the 1939 amendment applied only to subsection (b) which involved purchasers of securities "without notice or knowledge of the existence of such lien."

This being true, we are confronted with the situation which was described by Paul and Mertenenes in their "Law of Federal Income Taxation" sec. 47.38 as follows: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount 'shall be a lien' which shall arise at the time the assessment list was received by the

Collector unless 'another date is specifically fixed by law.' This provision does not touch the validity or effect of the lien as between the Government and mortgagees, purchasers and judgment creditors,—as between them, the statute is specific. Since the specific clause providing for the invalidity of liens must mean that, as between the Government and any other creditor or lien claimants, the Government's lien must prevail from the time of demand without further filing." The evidence here is undisputed that the assesment list was filed with the Collector and demand made in 1934. Consequently, if the claim which Rosebush pledged to the Intervenor on July 27, 1937, was property or a right to property, real or personal, at the time of the filing of the assessment list and demand, then the assignment to the Intervenor was subordinate and inferior to it because the statute, 26 U.S.C.A. sec. 3670, provided if any person liable to pay any tax neglects or refuses to pay the same after [183] demand "the amount (including any interest penalty, additional amount or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property whether real or personal belonging to such person" and further provided (26 U.S.C.A. 3671) "* * * The lien shall arise at the time the assessment was received by the Collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time." 26 U.S.C.A. sec. 3671. The statutes covering the collection of taxes are

broad and comprehensive and the lien for taxes attaches to all of the property in the possession of the taxpayer to the extent of his interests and his rights thereto. *Metropolitan Life Ins. Co. v. United States*, 107 F.(2) 311. Property is a word of very broad meaning and when used without qualification may reasonably be construed to include obligations, rights and other intangibles as well as physical things. *Fidelity & Deposit Co. of Maryland vs. Arenz*, 290 U. S. 66. Property within the tax laws should not be given a narrow or technical meaning. *Commissioner of Internal Revenue vs. Stephens-Adamson Mfg. Co.*, 51 F.(2) 681. Where a right is subject to ownership or transfer and may be brought within the dominion and control of the court through some recognized process, it is property. *Citizens State Bank of Barstow, Tex., vs. Vidal*, 114 F. (2) 380, 383. The fact that two or more persons may jointly own property will not prevent the lien from attaching to the taxpayer's share. *Cannon vs. Nichols*, 80 F. (2) 934. Moneys derived from the liquidation of assets held by a receiver or shareholders' agent after the payment of all of the obligations of an insolvent national bank may be recovered in an action at law [184] by the contributing shareholder against the receiver who refuses to repay it. *McCarty vs. Gault*, 24 F. Supp. 977.

The Intervenor urges that the tax lien only covered such property as the taxpayer owned and possessed at the time of the filing of the assessment list and the demand. It urges that all of

the assets belonging to the bank were, on that date, in the hands of the United States Government acting through the Comptroller of the Currency and his duly designated receiver. 12 U.S.C.A. 192. However, the moneys which are the subject of this controversy do not stem alone from the assets of the bank but also from the accretions thereto acquired by assessments for the purpose of furthering the liquidation of the assets of the insolvent bank and the persons contributing to this result are entitled to special treatment over and above that to which their ownership of shares in the association entitles them. 6 U.S.C.A. 197. In *McCarty vs. Gault*, *supra*, Judge Fee graphically describes this distinction: "the shareholders, who notwithstanding the compulsion of law, contributed nothing to the fund, are entitled to little consideration. The stock held by each of them became a liability instead of an asset upon the incidence of insolvency. The statute indicates a purpose to give to these stockholders a share in the final residue only. The stockholder who has paid the assessment in full, * is given a peculiar position. He is entitled to enforce a liability of the bank to him upon the same footing as other claimants. This privilege is not extended to a shareholder who has not paid the assessment." In that case, it was held that a shareholder was entitled to receive interest on the amount of the assessment from the date of payment by him. Clearly, such a right constitutes property and, although in February, 1934, it was unliqui-

dated and the amount undetermined, it was then a property right belonging to Rosebush to which the lien would then attach. Re: Rosenberg's Estate, 269 N. Y. 244, 199 N. E. 206, certiorari denied, 298 U. S. 669; United States vs. Canfield, 29 F. Supp. 734. [185]

There was no essential change in the character of the assets from which this money was derived as between February, 1934, and July, 1937. Its possession had been transferred from the Comptroller's receiver to the shareholders' agent. At both times, it consisted of notes and mortgages and stocks and bonds which were being liquidated and reduced to cash. The Intervenor, asserting as it does that Rosebush had an interest in those assets which he could pledge in July, 1937, can hardly be heard to say that he did not have an interest in those assets which could be subjected to a lien in 1934. It is true that Intervenor defends its assignment on the basis of two Washington cases (Straus vs. Wilsonian Investment Company, 177 Wash. 167; Reconstruction Finance Corporation vs. Hambright, 116 Wash. Dec. 71) in which the validity of after acquired property clauses in chattel mortgages is upheld. But the agreement of July 27, 1937, contains no such language.

There is nothing in the case of United States vs. Long Island Drug Co., Inc., 115 F.(2) 983, on which Intervenor relies, which runs counter to this conclusion. In that case, the moneys attempted to be subjected to the lien were wages earned by

the taxpayer after the filing of the assessment list and the demand for payment and after the levy upon the defendant. In that case, the court definitely recognized the rule laid down in *Re Rosenberg's Estate*, *supra*, and in *United States vs. Canfield*, *supra*. It used this language: "They (future earnings) are contingent upon performance of a contract of service and represent no existing rights of property. They are quite distinguishable from the right of a *cestui que trust*, whose equitable life estate may be subjected to a lien on behalf of the Government for unpaid taxes." In the *Long Island Drug* case the court specifically rejected its previous ruling in *United States vs. Western Union Telegraph Co.*, 50 F. (2) 102, to the effect that the lien is limited to tangible property as "dictum based on a too narrow reading of the statute." Furthermore, I would respectfully [186] point out that, in making the statement "rights which do not exist at the time of the demand upon the taxpayers are not subjected to any lien," the Second Circuit relied on *United States vs. Pacific Railroad*, 1 Fed. 97, which was decided when the statute provided "the amount shall be a lien in favor of the United States from the time it was due until paid", Act of July 13, 1866, 14 Stat. 98. In 1934, the statute provided: "The lien shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time." 26 U.S.C.A. Sec. 3671, 45 Stat. 875, Rev. Act of 1928. On this point, see *Graves vs. Commissioner*, 12 B. T. A. 124, General Counsel Memorandum,

C. V. VII-2, p. 94; Minnesota Mutual Life Insurance Co. vs. United States, 47 F. (2) 942; United States vs. Taft, 44 F. Supp. 564.

Intervenor further urges the pertinency in this case of *Curry vs. McCanless*, 307 U. S. 357, *Graves vs. Elliott*, 307 U. S. 383, *State Tax Commission of Utah vs. Aldrich*, 316 U. S. 174. Had the protection of the Statute, 26 U.S.C.A. 3672, been extended to pledgees prior to the execution of the agreement of July 27, 1937, these cases might have been valuable to the consideration of this case. Even so, they would not have been decisive in Intervenor's favor. This for the reason that, while they extended the right of taxation to a state other than the domicile of the owner of intangibles, they did not attempt to prevent the state in which the owner was domiciled from exercising its power of taxation. As Mr. Justice Jackson, in his vigorous dissent in *State Tax Commissioner vs. Aldrich*, 316 U. S. 174, 191, put it: "The right of a State to tax succession to corporate stock by death of one domiciled therein, while not abrogated, is now subjected to an interfering and overlapping right of the State which chartered the corporation to tax the same stock transfer * * *." [187] It is true that, in each of these cases, the question of situs of intangibles is considered. In none of them does the Supreme Court hold that that situs is limited for purposes of state taxation to the domicile of the corporation issuing the intangibles or of the trustee who may have legal title to them.

The reach of the ruling so far as it interests us here is described by the present Chief Justice in *Curry vs. McCanless*, 307 U. S. 357, 372, "If it be thought that it is identity of the intangibles with the person of the owner at the place of his domicile which gives power over them and hence 'jurisdiction to tax,' and this is the reason underlying the maxim *mobilia sequuntur personam*, it is certain here that the intangibles for some purpose are identified with the trustee, their legal owner, at the place of its domicile and that in another different relationship and for a different purpose—the exercise of the power of disposition at death, which is the equivalent of ownership—they are identified with the place of domicile of the testatrix, Tennessee. In effecting her purposes, the testatrix brought some of the legal interests which she created within the control of one state by selecting a trustee there and others within the control of the other state by making her domicile there. She necessarily invoked the aid of the law of both states, and her legatees, before they can secure and enjoy the benefits of succession, must invoke the law of both." I see nothing in these cases which supports Intervenor's position.

Since it is apparent that the United States had a lien on this property on July 27, 1937, then that provision of the Intervenor's contract which makes its assignment subsequent and junior to such lien, makes necessary the ruling that the funds here involved should be awarded to the United States

less the sum of Two Hundred Dollars (\$200.00) reasonable attorney's fees for Robbins.

L. B. SCHWELLENBACH

United States District Judge

March 31, 1943

[Endorsed]: Filed March 31, 1943. [188]

[Title of Court and Case.]

ALTERNATIVE MOTION FOR JUDGMENT
NOTWITHSTANDING DECISION AND
FOR A NEW TRIAL

Comes now complainant and petitioner, Investment and Securities Co., and moves the court for an order in its favor in the sum of \$6500.00 notwithstanding the decision on the ground that the complainant and petitioner Investment and Securities Co. was the owner of a prior claim to said sum of \$6500.00 superior to the claim of the United States of America, for the reason that prior to December 1, 1941, no notice of tax lien was filed either with the Clerk of the Federal District Court of the Eastern District of Washington, or the County Auditor of Spokane County.

Without waiving the foregoing motion and in the event the same is overruled, the complainant and petitioner, Investment and Securities Co. moves the court to set aside said decision and grant a new trial to the complainant and petitioner, Investment and Securities Co., upon the following grounds:

I.

Insufficiency of the evidence to justify the decision and that it is against the law.

II.

Error in law occurring at the trial and excepted to at the time by complainant and petitioner, Investment and Securities Co.

WITHERSPOON WITHER-
SPOON & KELLEY

By W. V. KELLEY

Attorneys for Petitioner and
Complainant, Investment and
Securties Co.

Copy received this 23 day of April, 1943.

LALLY

Attorney for Robbins

Copy received this 23rd day of Apr, 1943.

EDW. M. CONNELLY

H. ERICKSON

Attorneys for —————

[Endorsed]: Filed Apr. 23 1943. [189]

[Title of Court and Cause.]

COURT MINUTES (Journal 15, Page 945)
APRIL 1943 TERM MONDAY, APRIL 26, 1943

17th day

Court convened pursuant to adjournment, at 9:45
A.M. Present: Honorable Lewis B. Schwellenbach,
District Judge, A. A. LaFramboise, Clerk, Harvey

Erickson, Assistant U. S. Attorney, R. R. Isaacs,
Deputy U. S. Marshal,

PROCEEDINGS

* * * *

Now on this 26th day of April, 1943, this matter came on for hearing on motion of Investment and Securities Company for Judgment notwithstanding the decision or for new trial, and was argued by Mr. Wm. V. Kelley for the Investment & Securities Co. and by Harvey Erickson for Frank J. Kuhl, Collector of Internal Revenues and the United States of America. Motion Denied.

Plaintiff's proposed findings, refused.

As to Defendant's proposed findings, strike out "certificate of participation" in findings and conclusions. Add to Finding 5 beginning of fourth line—"The right to participate in the dividends to shareholders".

* * * *

Thereupon Court adjourned until tomorrow April 27th, 1943, at 10:00 a. m. [190]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming on for trial before the above entitled Court on this 23rd day of February, 1943, and the intervening plaintiff being represented by William V. Kelley of Witherspoon, Witherspoon

& Kelley, and the cross-defendant and interpleader, Charles P. Robbins being represented by Mr. Thomas A. E. Lally, and the defendant, Frank J. Kuhl, being represented by Harvey Erickson, Assistant United States Attorney, and the additional intervenor, United States of America being represented by Harvey Erickson, Assistant United States Attorney, and the supplemental defendants, Judson G. Rosebush and Barbara J. McNaughton Rosebush, being adjudged to be in default, and the Court having on March 31, 1943, rendered its opinion in the above entitled case, the Court makes the following:

FINDINGS OF FACT

I.

That the United States of America made an assessment for the calendar year of 1928 against Judson G. Rosebush in the Revenue Collection District of Wisconsin in the year 1934, in the amount of \$37,220.85, for income taxes for the year 1928. That immediately thereafter notices of the tax lien of the United States against Judson G. Rosebush were recorded with the Clerk of the United States District Court for the Eastern District of Wisconsin, at Milwaukee, and with the Register of Deeds for Outagamie County of Wisconsin. The notices of tax lien were recorded prior to the assignment of the supplemental defendant, Judson G. Rosebush, to the intervening plaintiff, Investment and Securities Company.

II.

That during the year 1937, the United States brought an action in the District Court, for the Eastern District of Wisconsin, against Judson G. Rosebush, a resident of Appleton, Wisconsin.

III.

That on November 26, 1941, a judgment was entered in the Eastern District of Wisconsin against Judson G. Rosebush in the sum of \$37,-220.85 plus costs.

IV.

That on November 27, 1941, the United States Attorney for the Eastern District of Wisconsin, caused a Writ of Execution to issue against the property of Judson G. Rosebush; that at the time of the issuance of the Writ of Execution the sum of \$4,250.00 was owing by the Shareholders' Agent, Charles P. Robbins, and since said time an additional sum of \$2,250.00, making a total of \$6,500.00 has become due and owing the said Judson G. Rosebush, as the result of his right to participate in the dividends of the Shareholders of The Exchange National Bank.

V.

That the Federal tax lien which attached against the said Judson G. Rosebush in the sum of \$37,220.85 during the year 1934, attached as a lien upon all the monies and property then in the hands of the said Judson G. Rosebush. The right to participate in the dividends of the Shareholders of

The Exchange National Bank of Spokane, Washington, was during the year 1934, and at all times thereafter, property of the said Judson G. Rosebush

VI.

That on July 27, 1937, Judson G. Rosebush and the Investment and Securities Company, intervening plaintiff herein, made and entered into an agreement referred to, whereby the said Judson G. Rosebush assigned all his right, title and interest to the Investment and Securities Company of certain monies due the said Judson G. Rosebush by the cross-defendant and interpleader, Charles P. Robbins, to the Investment and Securities Company, subject to the claims and the lien of the United States, by virtue of the income tax assessments duly filed in the State of Wisconsin.

VII.

That Thomas A. E. Lally, attorney for the cross-defendant and interpleader, is entitled to the sum of \$200.00 as a reasonable attorney's fee for his services in said case, and in addition thereto, is entitled to the sum of \$16.00 as court costs paid by him.

VIII.

That the Investment and Securities Company had actual notice of the claim of the United States to the right to participate in the dividends of the Shareholders of The Exchange National Bank, and had notice that the United States claimed a prior right and lien to all monies coming from Charles

P. Robbins, Shareholders' Agent of The Exchange National Bank, to the said Judson G. Rosebush, as a result of the liquidation of the said bank. [192]

IX.

That an additional dividend of an undetermined amount will be paid by Charles P. Robbins, Shareholders' Agent, upon the said right mentioned herein.

Dated this 28 day of April, 1943.

L. B. SCHWELLENBACH

District Judge

Presented by:

EDWARD M. CONNELLY

HARVEY ERICKSON

Assistant United States Attorney

From the foregoing Findings of Fact the Court make the following:

CONCLUSIONS OF LAW

I.

That the right of the intervening plaintiff, Investment and Securities Company, was junior to and inferior to the tax lien of the United States.

II.

The additional intervenor, United States of America, had a tax lien against the right to participate in the dividends of the Shareholders of The Exchange National Bank, which Judson G.

Rosebush assigned to the intervening plaintiff, Investment and Securities Company.

III.

The right to participate in the dividends of the Shareholders of The Exchange National Bank was a property right, although in February, 1934, it was unliquidated and the amount undetermined and belonged to Judson G. Rosebush, and the lien of the United States attached thereto in February, 1934.

IV.

The right to participate in the dividends of the Shareholders of The Exchange National Bank, was intangible personal property, and the lien of the United States attached thereto as a result of the United States filing its assessment list with the Collector of Internal Revenue, for the District of Wisconsin, and in filing a notice of the tax lien with the Clerk of Outagamie County, Wisconsin, where Judson G. Rosebush resided.

V.

That the United States shall be entitled to the sum of \$6,284.00, and that \$200.00 shall be awarded as attorney's fees and \$16.00 as court costs to Thomas A. E. Lally, attorney for the cross-defendant, Charles P. Robbins. [193]

VI.

That future payments covered by the right to participate in the dividends of the Shareholders of The Exchange National Bank, and payable to Jud-

son G. Rosebush, shall be paid to the additional intervenor, United States of America.

Dated this 28 day of April, 1943.

L. B. SCHWELLENBACH

District Judge

Presented by

HARVEY ERICKSON

Assistant United States Attorney

Copy received this 28th day of April, 1943, and approved as to Form.

WITHERSPOON WITHER-
SPOON & KELLEY

Attorneys for Investment and
Securities Company, Inter-
vening Plaintiff

[Endorsed]: Filed Apr 28 1943. [194]

In the United States District Court for the Eastern
District of Washington—Northern Division

No. 235

INVESTMENT AND SECURITIES COMPANY,
a corporation

Plaintiff,

vs.

CHARLES P. ROBBINS, Shareholders' Agent of
The Shareholders of the Exchange National
Bank of Spokane, Washington,
Cross-Defendant and Interpleader

vs.

FRANK J. KUHL, Collector of Internal Revenue
for Wisconsin,

Defendant

UNITED STATES OF AMERICA,
Additional Intervenor

vs.

JUDSON G. ROSEBUSH and BARBARA J.
McNAUGHTON ROSEBUSH, his wife,
Supplemental Defendants

AMENDED JUDGMENT

This matter coming on for hearing before the
above entitled Court on February 23, 1943, and a
pre-trial order having been entered in said case on
January 19, 1943, and the intervening plaintiff, In-

vestment and Securities Company, being represented by William V. Kelley of Witherspoon, Witherspoon & Kelley, and the cross-defendant and interpleader, Charles P. Robbins, Shareholders' Agent, being represented by Thomas A. E. Lally, and Frank J. Kuhl, Collector of Internal Revenue, defendant, and United States of America, additional intervenor, being represented by Harvey Erickson, Assistant United States Attorney, and the supplemental defendants, Judson G. Rosebush and Barbara J. McNaughton Rosebush, his wife, being adjudged in default, and the Court having on March 31, 1943, issued its Memorandum Opinion in said cause, and the Court having entered its Findings of Fact and Conclusions of Law, it is therefore

Ordered, Adjudged and Decreed that the additional intervenor, United States of America, is entitled to the sum of \$6,284.00 in the hands of the Clerk of the United States District Court for the Eastern District of Washington, and that Thomas A. E. Lally, Attorney for the Shareholders' Agent, shall be awarded the sum of \$200.00 as attorney's fees and \$16.00 as Court costs advanced by him, and the Clerk is directed to distribute same in the above amounts to the respective parties out of the \$6500.00 on deposit, and that any future payments resulting from the right to participate in the dividends of the Shareholders of The Exchange National Bank, and payable to the said Judson G. Rosebush, shall be paid to the additional intervenor, United States of America.

Approved, Clerk is directed to enter.

Dated this 30th day of April, 1943.

L. B. SCHWELLENBACH

District Judge.

Presented by

HARVEY ERICKSON

Assistant United States Attorney

Copy received this 30th day of April, 1943, and approved as to Form.

THOS. A. E. LALLY

Atty. for Robbins

W. V. KELLEY

Attorneys for Investment and
Securities Company, Inter-
vening Plaintiff

[Endorsed]: Filed Apr 30 1943. [195]

[Title of Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Investment and Securities Company, a corporation, complainant in intervention and petitioner for declaratory relief, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action. Amended judgment after trial by the Court was entered in this action on April 30, 1943.

Dated this 13th day of July, 1943.

WITHERSPOON WITHER-
SPOON & KELLEY
WILLIAM V. KELLEY

Attorneys for Petitioner and
Complainant, Investment
and Securities Company

Mailed copy to Thos. A. E. Lally & Edw. M.
Connelly, July 14, 1943.

A. A. LaFRAMBOISE,
Clerk

[Endorsed]: Filed Jul 13 1943. [196]

No. 76 604

\$250.00

[Title of Court and Cause.]

APPEAL BOND

Know All Men By These Presents, That we, Investment and Securities Company, a corporation, as Principal, and the United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto United States of America in the just and full sum of Two Hundred Fifty and no/100ths (\$250.00), good and lawful money of the United States of America, well and truly to be paid, and for the true payment of which we hereby bind ourselves, our and each of our heirs, executors, administra-

tors and successors, jointly and severally, firmly by these presents.

Witness our hands and seals this 13th day of July, A. D. 1943.

The Condition of the Above Obligation Is Such That, Whereas the above named Plaintiff has appealed to the Circuit Court of Appeals for the Ninth Circuit from the final judgment of the District Court of the United States for the Eastern District of Washington, Northern Division, entered against it in the above entitled action on the 30th day of April, 1943; and

Whereas, the above named principal has heretofore given due and proper notice that it will appeal from said decision and judgment of the District Court of the United States for the Eastern District of Washington, Northern Division;

Now, if the said principal, Investment and Securities Company, a corporation, shall pay to the defendants above named, all costs and damages that may be awarded against it on the appeal, or on the dismissal thereof not exceeding Two Hundred Fifty and no/100ths Dollars (\$250.00), then this obligation shall become null and void; otherwise it shall be and remain in full force and effect.

[Seal]

INVESTMENT AND SECUR-
ITIES COMPANY

By GEO. L. KIMMEL

Vice Pres.

[Seal] UNITED STATES FIDELITY
AND GUARANTY COM-
PANY

By WILL A. KOMMERS
Attorney-in-Fact

[Endorsed]: Filed Jul 13 1943. [197]

United States Fidelity and Guaranty Company
Baltimore - Maryland

No. 76623

\$7,000.00

[Title of Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents, That we, Investment and Securities Company, a corporation, as Principal, and the United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto the United States of America in the just and full sum of Seven Thousand and no/100ths Dollars (\$7,000.00) good and lawful money of the United States of America, well and truly to be paid, and for the true payment of which we hereby bind ourselves, our and each of our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Witness our hands and seals this 16th day of August, A. D. 1943.

Whereas, lately at the District Court of the United States for the Eastern District of Washington, Northern Division, in an action pending in said Court between Investment and Securifies Company, a corporation, Intervening Plaintiff, and Charles P. Robbins, Shareholders Agent of the Shareholders of The Exchange National Bank of Spokane, Washington, Cross-Defendant and Interpleader; Frank J. Kuhl, Collector of Internal Revenue for Wisconsin, Defendant; United States of America, Additional Intervenor; Judson G. Rosebush and Barbara J. McNaughton Rosebush, his wife, Supplemental Defendants, a judgment was entered decreeing that the Additional Intervenor, the United States of America, is entitled to the sum of Six Thousand Two Hundred Eighty Four and no/100 Dollars (\$6,284.00), paid into the hands of the Clerk of the District Court of the United States for the Eastern District of Washington, Northern Division, with interest thereon at the rate of six percent per annum from the 30th day of April, 1943, and

Whereas, said Investment and Securities Company, a corporation, Intervening Plaintiff is prosecuting an appeal to the United States Circuit Court of Appeals to reverse the judgment in the above entitled action, given [198] and entered by said District Court of the United States for the Eastern District of Washington, Northern Division, on the 30th day of April, 1943.

Now, the condition of this obligation is such that

if the said Investment and Securities Company, a corporation, shall prosecute said appeal to effect and answer all damages and costs, and satisfy said judgment if it shall fail to make good said appeal, then the above obligation to be void; otherwise to remain in full force and virtue.

[Corporate Seal]

INVESTMENT AND SE-
CURITIES COMPANY

By L. A. STILSON

Secretary

[Corporate Seal]

UNITED STATES FIDELITY
AND GUARANTY COM-
PANY

By WILL A. KOMMERS,

Attorney-in-Fact

Approved August 18, 1943.

L. B. SCHWELLENBACH

U. S. District Judge

[Endorsed]: Filed Aug 18, 1943. [199]

[Title of Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY IN
THIS APPEAL

I.

The Federal tax lien against Rosebush arose February 18, 1934, when the assessment list relative to

his 1928 income taxes was received by the Collector of Internal Revenue at Milwaukee, Wisconsin.

II.

As a result of the agreement of July 27, 1937, by the terms of which Rosebush for additional value then received assigned to Investment and Securities Company, as security for prior indebtedness to it in excess of \$76,000, any recovery which might be made on the assessment he had paid on stock of the Exchange National Bank of Spokane, the Investment and Securities Company came within the protection of Section 3186 of Revised Statutes as amended by Section 613 of the Revenue Act of 1928, 26 USCA (Internal Revenue Acts), page 461, which provided in part as to the Federal tax lien

“(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector * * * ”

III.

This statute imposing a lien for Federal income taxes did not provide for any special priority as between such liens and other liens (such as the lien of Investment and Securities Company) on the property of the taxpayer Rosebush, but did provide

“(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the Collector—

“(1) in accordance with the law of the State or Territory in which the property sub-

ject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice; or

“(2) in the office of the clerk of the United States District Court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law provided for the filing of such notice
* * * ”

(Section 3186 of the Revised Statutes as amended by Section 613 [200] of the Revenue Act of 1928, 26 USCA (Internal Revenue Acts), page 461.)

IV.

Where the mortgage or other lien attached to the property of the taxpayer before the filing of notice of the Federal tax lien and the mortgagee or other lien holder was within the class intended to be protected by the foregoing provision, such mortgagee or other lien holder was entitled to priority over the tax lien.

V.

Notice of the lien was never filed by the Collector for Wisconsin in any proper office in the State of Washington, although the Federal statutes provided (1) for a summary method for the enforcement of tax liens on both personal and real property by distraint and sale and made provision for distraint by a collector outside of his district (26 USCA § 3713, 26 USCA § 3678); or (2) for a suit to recover taxes in the name of the United States in any proper form of action before any Federal District Court of the United States, for the district

within which the liability for such taxes is incurred or where the party from whom such tax is due resides at the time of the commencement of said action (53 Stat. 460, 26 USCA § 3744).

VI.

The property subject to the lien was situated in Washington; The agreement of July 27, 1937, gave the Investment and Securities Company a lien on future acquired personal property of Rosebush in Washington in the form of any recovery on the assessment of his stock in the Exchange National Bank of Spokane, Washington.

VII.

Regardless of whether Investment and Securities Company came within the protection of the Revenue Act of 1928 when the agreement of July 27, 1937, was executed, nevertheless the claim for tax lien on the recovery on the assessment of the Exchange National Bank stock owned by Rosebush, which was never made in Washington until a writ of Fieri Facies was issued in Decemer, 1941, by the Federal District Court for the Eastern District of Wisconsin, to [201] be served on the Shareholders Agent of said Bank in Washington, was barred by the Statute of Limitations, as set forth in Internal Revenue Code, Section 276 (c), Title 26 USCA, Section 276 (c), which provides

“Collection after assessment. Where the assessment of any income tax imposed by this chapter has been made within the period of limitation properly applicable thereto, such tax

may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. 53 Stat. 87."

WITHERSPOON, WITHER-
SPOON & KELLEY
WILLIAM V. KELLEY

Attorneys for Complainant
and Petitioner

Service of the foregoing statement of points upon which appellant intends to rely on appeal, by service of a copy thereof, by each of the undersigned is hereby accepted this 13th day of July, 1943.

THOS. A. E. LALLY

Attorney for Charles P. Rob-
bins, Shareholders Agent,
Cross-Defendant and Inter-
pleader.

EDWARD M. CONNELLY &
HARVEY ERICKSON

Attorneys for Defendant
Frank J. Kuhl and Inter-
venor U. S. A.

[Title of Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD
TO BE CERTIFIED FOR APPEAL PURPOSES

Comes now Investment and Securities Company, a corporation, complainant in intervention and petitioner for declaratory relief, and hereby designates the following parts of the record and proceedings to be included in the record on appeal with the U. S. Circuit Court of Appeals for the Ninth Circuit, to-wit:

1. Complaint for Intervention of Charles P. Robbins.

2. Special Appearance and Plea to Quash for Lack of Jurisdiction by United States.

3. Motion to File Complaint in Intervention and Petition for Declaratory Relief.

4. Notice of Argument on Motion to Intervene.

5. Authorities of the United States in Support of Motion for Special Appearance and Plea to Quash for Lack of Jurisdiction.

6. Complaint in Intervention and Petition for Declaratory Relief of Investment and Securities Company.

7. Order denying Motion to Quash.

8. Order granting leave to Investment and Securities Company to intervene.

9. Order for Intervention of United States of America.

10. Answer of Cross-Defendant Charles P. Robbins.

11. Answer of defendant Frank J. Kuhl, Collector of Internal Revenue for Wisconsin.

12. Answer in Intervention of the United States of America.

13. Reply to Answer of Cross-Defendant Charles P. Robbins.

14. Motion to Make More Definite and Certain or for a Bill of Particulars of complainant and petitioner as to answer of the United States.

15. Motion to Strike of complainant and petitioner as to Answer in Intervention of the United States.

16. Motion to Strike of complainant and petitioner as to Answer of defendant Frank J. Kuhl.

17. Reply of Charles P. Robbins, Shareholders Agent, to Answer of United States of America.

18. Notice that Charles P. Robbins, Shareholders Agent, has paid Additional Sums into the Court Registry.

19. Reply of Charles P. Robbins to Answer of Frank J. Kuhl.

20. Motion for Summary Judgment of United States of America. [203]

21. Statement of Authorities on Intervenor's (United States of America) Motion for Summary Judgment.

22. Order Denying Motion to Make More Definite and Certain and for a pre-trial conference.

23. Petition of Charles P. Robbins to Have Supplemental Complaint Filed and that Process issue to Judson G. Rosebush and Barbara J. McNaughton Rosebush.

24. Supplemental Petition and Complaint of Charles P. Robbins.

25. Order Granting Petition of Charles P. Robbins and ordering issue of process.

26. Motion to Vacate Order Joining Judson G. Rosebush and Barbara J. McNaughton Rosebush as Defendants.

27. Affidavit resistance of Charles P. Robbins to motion to vacate joinder of defendants Rosebush.

28. Order Denying Motion of United States of America to vacate joinder of defendants Rosebush.

29. Decree against Supplemental Defendants, Judson G. Rosebush and Barbara J. McNaughton Rosebush.

30. Order in re Pre-Trial Hearing.

31. Reply to Answer of Defendant Frank J. Kuhl.

32. Reply of Investment and Securities Company to Answer in Intervention of the United States of America.

33. Stipulation to amend replies of complainant and petitioner.

34. Amended Reply to Answer in Intervention of the United States of America.

35. Amended Reply to Answer of Defendant Frank J. Kuhl.

36. Defendants' Citation of Authorities.

37. Authorities in Behalf of Investment and Securities Company in form of letter to Honorable L. B. Schwellenbach under date of February 23, 1943.

38. Reporter's Transcript of all Testimony, Evi-

dence and Proceedings at the Trial, including the Rulings of the Court on the Admission and Exclusion of Testimony.

39. Opinion of the Court filed March 31, 1943.

40. Alternative Motion for Judgment Notwithstanding Decision and for a New Trial.

41. Findings of Fact and Conclusions of Law filed April 28, 1943.

42. Amended Judgment filed April 30, 1943.

43. Notice of Appeal. [204]

44. Bond on Appeal.

45. Court Journal 15, Page 945.

The Clerk of the above entitled court is hereby directed to prepare, certify and transmit to said Circuit Court of Appeals the above designated Record on Appeal.

Dated this 13th day of July, 1943.

WITHERSPOON, WITHER-
SPOON & KELLEY
WILLIAM V. KELLEY

Attorneys for Complainant
and Petitioner Investment
and Securities Company.

Copy received July 13, 1943.

HARVEY ERICKSON

Asst. U. S. Atty. attorney for
Frank J. Kuhl & U. S. of
America Additional Inter-
venor.

THOS. A. E. LALLY

Atty for C. P. Robbins.

[Endorsed]: Filed July 17 1943. [205]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America

Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing type-written pages numbered from 1 to 205 inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal therein in the United States Circuit Court of Appeals as called for by the Designation of Portions of Record to be certified for Appeal Purposes, (except items numbered 4, 5, 21, 36, and 37 which are not a part of the Clerk's record in this cause), as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on appeal of Investment and Securities Company from the final judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, at San Francisco, California.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing record amount to the sum of \$73.70 and that the same has been paid in full by Witherspoon, Witherspoon and Kelley, Attorneys for Appellant.

In Witness Whereof, I have hereunto subscribed

my name and affixed the seal of the aforesaid District Court, this 18th day of August, 1943.

[Seal]

A. A. LaFRAMBOISE

Clerk of the United States
District Court for the East-
ern District of Washington.

[206]

[Endorsed]: No. 10531. United States Circuit Court of Appeals for the Ninth Circuit. Investment and Securities Company, a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

Filed August 21, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
Ninth Circuit

No. 10531

INVESTMENT AND SECURITIES CO., a corporation,

Intervening plaintiff,
vs.

CHARLES P. ROBBINS, Shareholders Agent of
the Shareholders of The Exchange National
Bank of Spokane, Washington
Cross-defendant and Interpleader,

vs.

FRANK J. KUHL, Collector of Internal Revenue
for Wisconsin,

Defendant,

vs.

UNITED STATES OF AMERICA,
Additional Intervenor,

vs.

JUDSON G. ROSEBUSH and BARBARA J.
McNAUGHTON ROSEBUSH, his wife,
Supplemental Defendants.

DESIGNATION OF POINTS AND THE
REQUEST FOR PRINTING OF RECORD

I.

Appellant hereby adopts and designates for consideration on this appeal, in lieu of a separate state-

ment, the designation of points on which it intends to rely heretofore designated by appellant and filed in the District Court.

II.

Appellant deems consideration by the court of the entire record, certified to this court by the clerk of the District Court, necessary on this appeal to a proper understanding of the questions presented and hereby requests that same be printed, excepting and omitting formal parts of pleadings and other court papers.

WILLIAM V. KELLEY
WITHERSPOON, WITHER-
SPOON & KELLEY

Attorneys for Investment and
Securities Co., Intervening
Plaintiff.

Service of the foregoing designation of points relied on and request for printing, by receipt of a copy thereof, is hereby accepted this 30th day of August, 1943.

HARVEY ERICKSON

rh

Assistant United States At-
torney, Attorney for de-
fendant Frank J. Kuhl and
United States of America,
additional invervenor.

Service of the foregoing designation of points relied on and request for printing, by receipt of a copy thereof, is hereby accepted this 30th day of August, 1943.

THOS. A. E. LALLY

Attorney for Cross-defendant
and Interpleader.

[Endorsed]: Filed Sept. 1, 1943. Paul P.
O'Brien, Clerk.

No. 10531

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

INVESTMENT AND SECURITIES COMPANY, A CORPORATION,
APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION

BRIEF FOR THE UNITED STATES

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
A. F. PRESCOTT,
EDWARD H. HORTON,

Special Assistants to the Attorney General.

EDWARD M. CONNELLY,
United States Attorney.

HARVEY ERICKSON,
*Assistant United States Attorney.
of Counsel.*

FILED

NOV 22 1943

PAUL B. CURRIEN

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10531

INVESTMENT AND SECURITIES COMPANY, A CORPORATION,
APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 213-224) is reported in 49 F. Supp. 620.

JURISDICTION

This is an appeal from the final judgment of the District Court, entered April 30, 1943 (R. 233-235), denying relief to Investment and Securities Company and awarding to the United States the sum of \$6,284 in the hands of the Clerk of the Court as well as future payments made to one Judson G. Rosebush, resulting from his right as a shareholder to participate in dividends payable to the shareholders of the Exchange National Bank, an insolvent national bank-

ing association, a resident of the Eastern District of Washington.

This action was originally brought in the nature of an interpleader by Charles P. Robbins, a citizen and resident of the State of Washington, as Shareholders' Agent for the shareholders of the Exchange National Bank, pursuant to Section 24, Twenty-sixth, of the Judicial Code.

Charles P. Robbins, as Shareholders' Agent, paid into court the total sum of \$6,500, being the amount of liquidating dividends due a shareholder, Judson G. Rosebush, and prayed that the Investment and Securities Company, claimant to the fund, and the United States Attorney and his deputies at Milwaukee, Wisconsin, seeking possession of the fund under a writ of *Fieri Facias* issued by the Clerk of the District Court for the Eastern District of Wisconsin, be enjoined from suing cross-defendant and interpleader, Charles P. Robbins. (R. 2-5, 99.)

Investment and Securities Company, a citizen and resident of the State of Washington, on April 2, 1942, filed its complaint in intervention and petition for declaratory relief in the court below. (R. 11.)

Frank J. Kuhl, defendant below, was the Collector of Internal Revenue for Wisconsin. (R. 20.)

Judson G. Rosebush and Barbara J. McNaughton Rosebush, his wife, supplemental defendants below, are citizens and residents of the State of Wisconsin. (R. 130.)

The United States of America, additional intervenor below, appeared and filed its answer in inter-

vention (R. 40-44), asserting its right to the money on deposit with the Clerk of the Court on the basis of a tax lien filed against Rosebush by the Collector of Internal Revenue for the Eastern District of Wisconsin, and also on the basis of a judgment in favor of the United States entered by the District Court for the Eastern District of Wisconsin on November 26, 1941 (R. 45-47), against Rosebush in the sum of \$37,220.85 plus costs, upon which a writ of *fiery facias* was issued and served upon Charles P. Robbins, cross-defendant and interpleader, on December 1, 1941 (R. 3).

The matter in controversy, exclusive of interest and costs, exceeds in value the sum of \$3,000 (R. 3, 99), and involves the construction of Section 3186 of the Revised Statutes, as amended by Section 613 of the Revenue Act of 1928, and Section 276 (c) of the Revenue Act of 1934.

Notice of appeal was filed July 13, 1943. (R. 235-236.) The jurisdiction of this Court is invoked under Section 128 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether the United States, on July 27, 1937, had a valid lien, under Section 3186 of the Revised Statutes, against certain property and rights to property belonging to Judson G. Rosebush which it is alleged he on that date assigned to Investment and Securities Company.

2. Whether collection of the assessment was barred under the provisions of Section 276 (c) of the Revenue Act of 1928.

STATUTES INVOLVED

Revised Statutes:

SEC. 3186 [as amended by Section 613 of the Revenue Act of 1928]. (a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) in accordance with the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice; or

(2) in the office of the clerk of the United States District Court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law provided for the filing of such notice; or

* * * *

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 276. SAME—EXCEPTIONS.

* * * *

(c) *Collection after assessment.*—Where the assessment of any income tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

STATEMENT

On July 27, 1937, Judson G. Rosebush, a citizen and resident of the State of Wisconsin (R. 130), was indebted to the United States on account of a deficiency in income taxes assessed against him by the Commissioner of Internal Revenue for the calendar year 1928 in the amount of \$37,220.85, including interest (R. 227).

This deficiency assessment was made by the Commissioner of Internal Revenue on February 9, 1934, and appeared on the Commissioner's assessment list for February, 1934 (R. 195, 197), and was received by the Collector of Internal Revenue at Milwaukee, Wisconsin, on February 18, 1934 (R. 98).

On February 27, 1934, written notice and demand for payment was served upon Rosebush (R. 195), and a second notice and demand for payment was served upon him on March 23, 1934 (R. 196).

On April 14, 1934, a warrant for distraint was issued by the Collector of Internal Revenue (R. 197-199), which was served on Rosebush on April 17, 1934 (R. 200).

Notices of tax lien were filed by the Collector of Internal Revenue with the Clerk of the District Court for the Eastern District of Wisconsin at Milwaukee, Wisconsin, on April 19, 1934 (R. 201-203); with the Register of Deeds of Outagamie County, Appleton, Wisconsin, on April 20, 1934 (R. 203, 227).

No notice of lien was ever filed in the State of Washington, either with the Clerk of the District Court for the Eastern District of Washington or the County Auditor of Spokane County, Washington. (R. 17, 99.)

During the year 1937 the United States brought an action against Rosebush (R. 228), and thereafter on November 26, 1941, judgment was entered in favor of the United States against Rosebush in the sum of \$37,220.85 on Rosebush's 1928 income-tax liability, plus costs (R. 99, 228).

On July 27, 1937, Rosebush was also indebted to the Investment and Securities Company in the sum of \$76,749. (R. 50.) At the time of the failure of the Exchange National Bank, of Spokane, Washington, on January 19, 1929, Rosebush was the owner of 250 shares of its capital stock and by reason thereof paid to the receiver of that bank assessments on his stock totalling \$25,000. (R. 13, 21.) When the Investment and Securities Company discovered that Rosebush had paid these assessments and that the Exchange Na-

tional Bank might pay its creditors in full and possibly have something to pay over to its former stockholders who had paid their assessments, it attempted to secure an assignment of the claim of Rosebush against the Exchange National Bank. (R. 173.)

On July 27, 1937, Rosebush executed an assignment to the Investment and Securities Company, dated July 27, 1937 (R. 49-56), the pertinent part of which for present purposes reads as follows (R. 53):

The party of the second part further agrees to and does hereby assign to party of the first part as security to the balance of indebtedness owing by the party of the second part to party of the first part any recovery which may be made by or on behalf of party of the second part from or on account of an assessment paid on stock of Exchange National Bank, Spokane, Washington, and further agrees to make, execute and deliver to party of the first part any further instruments or documents necessary, needful and proper to make this assignment for collateral purposes effective and to enable party of the first part to recover any amounts which may or shall be due by reason of the payment of such assessments on said Exchange National Bank stock. It is understood that the Collector of Internal Revenue has filed an Order of Distraint against party of the second part and that this assignment is subsequent and junior to any lien against said recovery that said Collector of Internal Revenue may have acquired by virtue of such Order of Distraint.

This assignment of July 27, 1937, was served upon Charles P. Robbins, Shareholders' Agent for the share-

holders of the Exchange National Bank, on March 4, 1938. (R. 99.)

On July 27, 1937, the Investment and Securities Company had actual notice of the claim of the United States to the right to participate in the dividends of the shareholders of the Exchange National Bank and had notice that the United States claimed a prior lien to all moneys coming from Charles P. Robbins, Shareholders' Agent of the Exchange National Bank, to Rosebush as a result of the liquidation of the bank. (R. 229-230.) The notices of the tax lien were recorded prior to Rosebush's assignment to the Investment and Securities Company. (R. 227.) On November 27, 1941, the United States Attorney for the Eastern District of Wisconsin caused a writ of execution to issue against the properties of Rosebush. This writ was served on Robbins, as Shareholders' Agent for the shareholders of the Exchange National Bank, on December 1, 1941. (R. 3.) At the time of the issuance and service of the writ of execution Robbins, as Shareholders' Agent, owed Rosebush the sum of \$4,250. Thereafter, an additional sum of \$2,250 became due, making a total of \$6,500 due and owing Rosebush as the result of his right to participate in the dividends of the shareholders of the Exchange National Bank. (R. 228.)

Charles P. Robbins, as Shareholders' Agent for the shareholders of the Exchange National Bank, of Spokane, Washington, filed his complaint in the nature of an interpleader and paid to the Clerk of the District Court for the Eastern District of Washington the

total sum of \$6,500 praying that the Investment and Securities Company and the United States Attorney and his deputies at Milwaukee, Wisconsin, be enjoined from suing him as such Shareholders' Agent. (R. 2-5, 99.) The District Court, on April 28, 1943, entered its findings of fact and conclusions of law (R. 226-232), and thereupon entered judgment in favor of the United States to the extent of the sum of \$6,284 then in the hands of the Clerk of the District Court and awarded the United States any future payments resulting from Rosebush's right to participate in the dividends payable to the shareholders of the Exchange National Bank (R. 233-234). From this judgment the Investment and Securities Company appealed to this Court. (R. 235-236.)

SUMMARY OF ARGUMENT

The property involved constituted intangible personal property and its situs, under the maxim *mobilia sequuntur personam*, was the domicile of its owner—Wisconsin. The notice of tax lien filed at the domicile of the taxpayer attached to all intangible property of the taxpayer, including the intangible asset here involved. The writ of execution issued in a suit filed at the domicile of the taxpayer was begun less than six years from the date of the assessment of the tax, February 9, 1934, hence recovery is not barred by the statute of limitations. Even assuming *arguendo* that the notice of lien did not cover the funds involved here, appellant is not entitled to priority over the Government's lien on the fund since the lien attached as against all except those specifically excepted by Re-

vised Statutes, Section 3186, as amended by Section 613 of the Revenue Act of 1928. Hence, the appellant must not only show that the notice of lien did not cover the property, but it must, in addition, bring it-self within the statute by showing that it was a mortgagee or purchaser. This it failed to do. (1) The assignment was for a pre-existing debt; (2) the taxpayer took with actual notice of the Government's lien for taxes; and (3) the assignment specifically provides that the rights of appellant are subsequent and junior to the prior claim of the Government for taxes.

ARGUMENT

I

The United States, on July 27, 1937, had a valid lien against certain property and rights to property belonging to Judson G. Rosebush which on that date he assigned to the Investment and Securities Company

It is undisputed that the Government's lien under the provisions of Section 3186 (a) of the Revised Statutes, as amended by Section 613 of the Revenue Act of 1928, *supra*, arose on the receipt by the Collector of Internal Revenue on February 18, 1934, of the Commissioner's assessment list, the section providing that the lien should "continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time." It is also undisputed that notices of the Government's tax lien (after the Collector's demand for payment had been refused by the taxpayer as well as payment under the Collector's warrant of distraint) were filed by the Collector with the Clerk of the District Court for the Eastern Dis-

trict of Wisconsin at Milwaukee, Wisconsin, on April 19, 1934, and with the Register of Deeds at Appleton, Outagamie County, Wisconsin, the taxpayer's domicile, on April 20, 1934.

The Government's tax lien upon the filing of the notices of lien became a specific statutory lien upon "all property and rights of property, whether real or personal" belonging to the taxpayer.

1. The notice of tax lien filed at the domicile of the taxpayer attached to all intangible property of the taxpayer, including the intangible asset involved here.

Section 3186 of the Revised Statutes, as amended by Section 613 of the Revenue Act of 1928, provides that if

* * * any person liable to pay any tax neglects or refuses to pay the same after demand, the amount * * * shall be a lien in favor of the United States upon *all* property and rights to property, whether real or personal, belonging to such person. * * * (*Italics supplied.*)

The word "all" is all inclusive. In the absence of clear intention on the part of Congress to limit its meaning, no reason exists to apply a definition foreign to accepted usage.

Although on July 27, 1937, the taxpayer's right to share in the liquidating dividends payable by the Shareholders' Agent was an unliquidated right and the amount was undetermined, it was, nevertheless, a presently existing right of which he was the owner. *Matter of Rosenberg*, 269 N. Y. 247, 199 N. E. 206, certiorari denied, 298 U. S. 669. Cf. *United States*

v. *Canfield*, 29 F. Supp. 734 (S. D. Cal.). Even if it could be considered as having arisen after the notices of tax lien were filed by the Government in the state of the taxpayer's domicile, it was, nevertheless, subject to the Government's tax lien. *Citizens Nat. Trust & S. Bank of Los Angeles v. United States*, 135 F. 2d 527 (C. C. A. 9th).

Where such a right may be brought within the dominion and control of a court it is "'property or rights of property' although intangible in character." *Citizens State Bank of Barstow, Tex. v. Vidal*, 114 F. 2d 380 (C. C. A. 10th).

It is settled, we think, that the taxpayer, as a contributing shareholder, could have maintained an action at law against the receiver of the bank or the Shareholders' Agent to recover his share of the liquidating dividends after the payment of all of the obligations of the insolvent bank. *McCarty v. Gault*, 24 F. Supp. 977, 990 (Ore.).

(a) *The situs of the property when the Government's notices of lien were filed and when the assignment was made on July 27, 1937, was the State of Wisconsin*

The taxpayer's right to share in the liquidating dividends payable by the Shareholders' Agent, or by the receiver of the bank, was intangible personal property and therefore, under the maxim *mobilia sequitur personam*, its situs at the time the Government's notice of tax lien was filed and at the time the assignment was made by the taxpayer to appellant on July 27, 1937, was the domicile of the owner, Appleton, Outagamie County, Wisconsin. *Farmers Loan Co. v. Minnesota*, 280 U. S. 204; *Baldwin v. Missouri*, 281

U. S. 586; *Beidler v. So. Car. Tax Commission*, 282 U. S. 1; *First National Bank v. Maine*, 284 U. S. 312.

As stated by the Supreme Court in *First National Bank v. Maine*, *supra* (pp. 329-330):

Ownership of shares by the stockholder and ownership of the capital by the corporation are not identical. The former is an individual interest giving the stockholder a right to a proportional part of the dividends and the effects of the corporation when dissolved, after payment of its debts. * * * And this interest is an incorporeal property right which attaches to the person of the owner in the state of his domicile.

The Government, by filing notice of lien in the city, county and state where the taxpayer was domiciled, obtained a valid, enforceable lien under the provisions of Section 3186 (a) against the taxpayer's intangible personal property, the situs of which was the domicile of the owner—Wisconsin. The Government's lien was, therefore, enforceable not only against the taxpayer but any person claiming under him.

Indeed, appellant apparently concedes (Br. 21) that we are dealing in this case with intangible personal property as to which the Supreme Court of the State of Washington has held Section 3779 of V Remington's Revised Statutes of the State of Washington (1931) (dealing with the recording of chattel mortgages "upon all kinds of personal property"), inapplicable as to intangible property such as accounts and income and choses in action. See *Heermans v. Blakeslee*, 97 Wash. 647, 167 Pac. 228, and *Hughes*,

Inc. v. Widders, 187 Wash. 452, 60 P. 2d 243. Under these decisions the Government's lien could not have been recorded in the State of Washington nor could appellant's assignment have been recorded there upon the same intangible personal property. Indeed, if the Government's notices of lien had not been filed in Wisconsin its lien would have been ineffective against appellant, as is shown by the recent decision of the District Court for the Northern District of California on July 21, 1943, in the case of *United States v. Spreckels*, 50 F. Supp. 789. In that case the court denied the Government's claim to certain intangible personal property against which a judgment had been recorded in San Mateo County, California, on November 14, 1936. In denying the Government's claim to a prior lien the court said (pp. 791-792):

The lien of the Government was properly recorded in Kings county and attached to the real property located there prior to the time it was executed upon by the bank. The balance of the property to which the bank makes claim under its judgment (with the exception of certain land in Tulare county where no lien was recorded by the Government) consists of intangible personal property. *Following the general rule that the situs of such property is the domicile of the owner, the Government should have recorded its lien in San Mateo county where the taxpayer resided. This was not done until 1937, after the bank had executed on such property under its judgment.*

I conclude that the rights of the banks should prevail as to all property acquired under its

judgment except the real property located in Kings county, upon which the United States had a valid and existing lien as against all the world, at the time execution was issued. (Italics supplied.)

II

Appellant was neither a mortgagee nor a purchaser within the meaning of Section 3186 (b) of the Revised Statutes, as amended by Section 613 of the Revenue Act of 1928

Section 3186 (b) of the Revised Statutes contains the following provisions:

(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) in accordance with the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice; or

(2) in the office of the clerk of the United States District Court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law provided for the filing of such notice; or

* * * * *

Appellant contends (Br. 18) that under these provisions it was a mortgagee, or at least a purchaser, and that, as to it, the Government's tax lien was therefore invalid. Even assuming arguendo that the notice of lien did not cover the funds involved here, appellant is not entitled to priority over the Government's lien on the fund since the Government's lien attached

as to all except those specifically mentioned in Revised Statutes, Section 3186, as amended by Section 613 of the Revenue Act of 1928, upon the Collector's receipt of the assessment list. *Equitable Life Assur. Soc. v. Moore*, 29 F. Supp. 179 (S. D. Ill.). Hence, appellant must not only show that the notice of lien did not cover the property, but it must, in addition, bring itself within the statute by showing that it was a mortgagee or purchaser. *MacKenzie v. United States*, 190 F. 2d 540 (C. C. A. 9th). This it has failed to do.

1. The assignment was for a pre-existing debt

This will be shown by consideration of the full terms of the assignment agreement. (R. 49-56.) It is there shown that the taxpayer was indebted to appellant on two notes given in 1932 which were secured by certain stocks. The indebtedness not having been paid, appellant, on April 22, 1936, conducted a sale, and, there being no other bidders, bid in the collateral and applied the proceeds to the taxpayer's indebtedness. (R. 51-52.) The taxpayer challenged the validity of the sale of 820 shares of Inland Empire Paper stock bid in by appellant for \$1. Appellant desired to obtain the taxpayer's approval of the sale and the assignment of his claim to participate in the liquidating dividends of the Exchange National Bank and to that end was "willing to afford the Pledgor certain opportunities to reacquire said stock" (R. 51-52), upon what terms we do not know. The taxpayer had no choice in the matter. The real consideration, however, for his assignment was the taxpayer's pre-existing debt.

This certainly was not a present consideration paid by appellant for the assignment and therefore appellant was not a "purchaser" or etc. within the meaning of Section 3186 (b). *Filipowicz v. Rothensies*, 43 F. Supp. 619 (E. D. Pa.). Nor, under the circumstances, was appellant a "mortgagee" within the meaning of the statute. Section 3780 of Remington's Revised Statutes of Washington requires an affidavit of good faith. No such affidavit was attached to the assignment. See *Heermans v. Blakeslee*, *supra*.

Nor was appellant a "pledgee." Subsequent to the execution of the agreement of July 27, 1937, and in 1939, Congress amended the section by Section 401 of the Revenue Act of 1939, c. 247, 53 Stat. 862, 892, by inserting the word "pledgee" immediately following the word "mortgagee." The section was not made retroactive, however, and has no application here.

2. The appellant took with notice of the Government's lien for taxes

The correspondence between the appellant and the taxpayer covering the period from March 29, 1937, to July 27, 1937 (R. 171-190), shows conclusively that appellant, prior to the assignment of July 27, 1937, had actual notice of the Government's claim and lien for taxes assessed against the taxpayer and of the warrant of distraint outstanding against him. The court below so found (R. 229-230), and appellant concedes that (Br. 17). The registry feature of the tax lien law, first added in 1913, was intended to protect only innocent mortgagees, purchasers and judgment creditors, i. e., those without notice, and

appellant, having had actual notice of the Government's claim and tax lien when it took the assignment of 1937, is second in right, not first.

Section 3186 of the Revised Statutes, as amended by Section 3 of the Act of March 1, 1879, c. 125, 20 Stat. 327, had been applied in 1893 as creating a lien in favor of the Government good even as against bona fide purchasers and encumbrancers. *United States v. Snyder*, 149 U. S. 210, 214. The agitation which arose because of that decision culminated in the enactment by Congress of the amendment by the Act of March 4, 1913, c. 166, 37 Stat. 1016, which as against any mortgagee, purchaser or judgment creditor required, as a condition to its validity, that the Government's lien "be filed by the collector in the office of the clerk of the district within which the property subject to the lien is situated." Section 3186 was further amended by Section 613 of the Revenue Act of 1928, the Act with which we are here concerned. The Act is obviously a registry or record law. In 1868 the Supreme Court declared the purpose of such a law to be to impart information. The Court said in *Patterson v. De la Ronde*, 8 Wall. 292, 300-301:

Besides, the object of all registry laws is to impart information to parties dealing with property respecting its transfers and incumbrances, and thus to protect them from prior secret conveyances and liens. It is to the registry, therefore, that purchasers, or others desirous of ascertaining the condition of the property, must look, and if not otherwise in-

formed, they can rely upon the knowledge there obtained. But if they have notice of the existence of unregistered conveyances and mortgages, they cannot, in truth, complain that they are, in any respect, prejudiced by the want of registry. In equity, *and in this country generally at law*, they are not permitted to defeat, under such circumstances, the rights of prior grantees or incumbrancers, but are required to take the title or security in subordination to their rights. The general doctrine is that knowledge of an existing conveyance or mortgage is, in legal effect, the equivalent to notice by the registry. * * *

That actual notice of a federal tax lien takes the place of record notice, has been held by the Circuit Court of Appeals for the Fifth Circuit in *Heyward v. United States*, 2 F. 2d 467, and in the case of *In re Glover-McConnell Co.*, 9 F. 2d 683, 689 (N. D. Ga.). These cases are applied in *Continental Baking Co. v. Helvering*, 75 F. 2d 243, 244, by the Court of Appeals for the District of Columbia. They are also cited in a footnote to *Phillips v. Commissioner*, 283 U. S. 589, 593. *Contra: United States v. Beaver Run Coal Co.*, 99 F. 2d 610 (C. C. A. 3d). The case at bar goes much deeper. As we have already pointed out, the Court in this case is dealing with intangible personal property, the situs of which is the domicile of the owner—Wisconsin. If that be true, and we submit that it is, then the Government's notices of tax lien were properly filed at the domicile of the owner of the property, and the Government's lien was therefore notice to the world. Appellant knew where the

taxpayer lived. It had actual notice of the Government's lien against the taxpayer. With actual notice of the Government's lien and of the warrant of distraint, it would seem that appellant is in no position to claim that its rights are superior to those of the Government.

3. The assignment specifically provides that the rights of the appellant are subsequent and junior to the prior claim of the Government for taxes

The assignment contained the following specific provision (R. 53):

It is understood that the Collector of Internal Revenue has filed an Order of Distraint against party of the second part and that this assignment is subsequent and junior to any lien against said recovery that said Collector of Internal Revenue may have acquired by virtue of such Order of Distraint. (Italics supplied.)

It is clear that this provision, inserted because of the insistence of the taxpayer, gave to appellant no rights as against the claim and lien of the United States for income taxes assessed against the taxpayer. What appellant took under the assignment was only that which the taxpayer intended it should take—a right subsequent and junior to that of the United States. Appellant is in no position to complain about the condition incorporated into the agreement at the insistence of the taxpayer. The correspondence shows that the appellant could not have obtained the assignment from the taxpayer otherwise. We submit that the Government's tax lien and its judgment lien were valid and enforceable against the fund held by

the Shareholders' Agent for the taxpayer, representing his right to share in the liquidating dividends payable to the shareholders of the Exchange National Bank.

III

Collection of the deficiency assessment made by the Commissioner on February 9, 1934, was not barred by the provisions of Section 276 (c) of the Revenue Act of 1928

The pertinent provisions of Section 276 (c) of the Revenue Act of 1928, *supra*, provide a limitation period for the collection of any income tax assessment. Such collection may be made, however, "by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax * * *."

It is not disputed that the Commissioner's income tax assessment for 1928 income taxes (R. 227) was made against the taxpayer in February, 1934.*

At the outset it may be conceded that no extension of the six-year period of limitation for the collection of the tax was ever executed by the taxpayer. The cases cited by appellant, dealing with the effect of waivers of the statutory limitation period for collection, obviously have no application here.

1. The writ of execution issued in a suit filed at the domicile of the taxpayer was begun less than six years from the date of the assessment of the tax; hence recovery is not barred by the statute of limitations

Suit for the recovery of the amount of the deficiency assessment made by the Commissioner was

*The warrant of distraint (R. 197) shows the date to be February 9, 1934.

filed by the United States against the taxpayer in the District Court for the Eastern District of Wisconsin, his domicile, during the year 1937, within six years from the date of the Commissioner's assessment, and thus within the period of limitations laid down by Section 276 (c), *supra*. The suit was therefore timely brought.

In this suit the District Court for the Eastern District of Wisconsin, on November 26, 1941, entered judgment against the taxpayer in the sum of \$37,-220.85, plus costs.

On November 27, 1941, the United States Attorney for the Eastern District of Wisconsin caused a writ of execution to be issued on the judgment which, on December 1, 1941, was served on Charles P. Robbins, as Shareholders' Agent for the shareholders of the Exchange National Bank.

On that date Robbins, as Shareholders' Agent for the shareholders of the Exchange National Bank, had in his possession the sum of \$4,250 and later an additional sum of \$2,250 due and owing the taxpayer as the result of his right to participate in the liquidating dividends payable to the shareholders of the Exchange National Bank; and these amounts, totalling \$6,500, were thereafter paid by Robbins to the Clerk of the District Court for the Eastern District of Washington. We submit that the action brought by the United States was timely and tolled the period for collection laid down by Section 276 (c), and that the judgment in favor of the United States was enforceable against all property and rights of property belonging to Rosebush, wherever situated and without

limitation. Appellant's contention that the United States was required to bring effective proceedings for the collection of the tax in the State of Washington before the expiration of the six-year period of limitations laid down by Section 276 (c), is clearly without merit and in that connection we cite the decision of the Circuit Court of Appeals for the Eighth Circuit in *United States v. Havner*, 101 F. 2d 161, where the court, in disposing of a similar contention, said (pp. 164-165):

There remains to be considered the contention of the taxpayer that whatever judgments the Government succeeds in obtaining in this action have become unenforceable or will become unenforceable after the expiration of the period of limitation calculated from the time when the taxes were assessed, because it was the intention of Congress, in enacting Section 276 (c), that no proceedings to collect should be taken after the statutory period had run, regardless of whether the Government had commenced a timely proceeding to reduce the tax liability of the taxpayer to judgment or not. This contention is ingenious but obviously unsound. The liability of a taxpayer to the Government is a debt and is subject to collection in the same way that other debts are collectible. *Price v. United States*, 269 U. S. 492, 500, 46 S. Ct. 180, 70 L. Ed. 363, and cases cited. In *Bowers v. New York & Albany Lighterage Co.*, 273 U. S. 346, 47 S. Ct. 389, 71 L. Ed. 676, the Supreme Court, in discussing the question as to whether Section 250 (d) of the Revenue Act of 1921, 42 Stat. 265—which provided that “no suit or proceeding for

the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts * * * shall be begun, after the expiration of five years after the date when such return was filed * * *",—barred collection by distraint proceedings begun after the expiration of the period of limitation, said (page 349, 47 S. Ct. page 390):

"There are two methods to compel payment. One is suit, a judicial proceeding; the other is distraint, an executive proceeding. The word 'proceeding' is aptly and commonly used to comprehend steps taken in pursuit of either. There is nothing in the language or context that indicates an intention to restrict its meaning, or to use 'suit' and 'proceeding' synonymously.

"The purpose of the enactment was to fix a time beyond which *steps to enforce collection* might not be initiated. The repose intended would not be attained if suits only were barred, leaving the collector free at any time to proceed by distraint." (*Italics supplied.*)

Section 276 (c) provides that income taxes "may be collected * * * by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period." It is obvious that the sole purpose of this enactment was to fix a time beyond which "steps to enforce collection might not be initiated." It adds nothing to the power of the Government to sue, but places a time limitation upon its right to sue. * * *

The right to initiate a suit to enforce collection of a tax necessarily implies the right to have its fruits, namely, judgments which are enforceable by execution. No doubt Congress might have provided for a period of limitation beyond which judgments obtained by the Government for taxes should be unenforceable, but, in the absence of any statute providing such a limitation, we think no court has power to restrict the right of the Government to enforce a judgment to which it is lawfully entitled.

* * * * *

Under the writ of execution issued to enforce its judgment lien against the taxpayer the Government was clearly entitled to enjoy the fruits of its judgment as against appellant's unrecorded assignment of July 27, 1937.

CONCLUSION

The judgment of the court below is correct. It should be affirmed by this Court.

Respectfully submitted,

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NOVEMBER 1943.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

INVESTMENT AND SECURITIES COMPANY,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

*Upon Appeal from the District Court of the United
States for the Eastern District of Washington*

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OCT 23 1943

PAUL P. O'BRIEN,

CLERK

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No. 10,531

IN THE
United States
Circuit Court of Appeals
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INVESTMENT AND SECURITIES COMPANY,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

*Upon Appeal from the District Court of the United
States for the Eastern District of Washington*

WITHERSPOON, WITHERSPOON AND KELLEY,
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Attorneys for Appellant.

JURISDICTION

This action was brought in the nature of an interpleader by Charles P. Robbins, Shareholders' Agent for the shareholders of the Exchange National Bank of Spokane, hereinafter called cross-defendant and interpleader. Cross-defendant and interpleader paid into court \$6,500.00, being the amount payable on account of liquidating dividends due a shareholder, Judson G. Rosebush, and prayed that the Investment and Securities Co. and the United States Attorney and his deputies at Milwaukee, Wisconsin, be enjoined from suing said Charles P. Robbins (Tr. 2, complaint for intervention).

Investment and Securities Co., appellant here and complainant in intervention and petitioner for declaratory relief, is a corporation under the laws of Washington (Tr. 2, complaint in intervention and petition for declaratory relief), hence a citizen and resident of Washington. Frank J. Kuhl, Collector of Internal Revenue for Wisconsin, defendant below, is a resident of the State of Wisconsin. Judson G. Rosebush and Barbara J. McNaughton Rosebush, his wife, supplemental defendants below, against whom default judgments were entered, are residents of Wisconsin. The United States of America is the additional intervenor which appeared asserting the right of the government to the money on the basis of a claim of tax liens and also on the basis of a certain writ of fieri facias issued in December 1941.

The matter in controversy, exclusive of interest

and costs, exceeds in value the sum of \$3,000.00 (complaint in intervention admitted by the pleadings and stipulation in pre-trial order of January 19, 1943, Tr. 3, 99) and involves the construction of certain federal statutes including Revised Statutes Sec. 3186 as amended by Sec. 613, Revenue Act of 1928, 26 U. S. C. A. Internal Rev. Acts, page 461, et seq. and 26 U. S. C. A. Internal Revenue Code, Sec. 276 (c), and an actual controversy exists as to the title to said property within the meaning of the Federal Declaratory Judgment Act, United States Judicial Code, Sec. 274 (d) (U. S. C. A. Title 28, Sec. 400).

Jurisdiction of the District Court existed under Section 41, Title 28 U. S. C. A., Judicial Code, Sec. 24 amended. The appeal to this court is from the final judgment denying relief to complainant and petitioner Investment and Securities Co. and awarding funds involved to the United States, less the sum of \$200.00 reasonable attorney's fees for Robbins, entered in the District Court on April 30, 1943. Notice of appeal was filed in the office of the Clerk of the District Court on July 13, 1943, and jurisdiction by this court is believed to exist under Sec. 225 (a) First, and (d), Title 28 U. S. C. A., Judicial Code, Sec. 128 amended.

STATEMENT OF THE CASE

Judson G. Rosebush, a citizen of Wisconsin, on July 27, 1937, owed Investment and Securities Co., of Spokane, Washington, (a Washington corporation), \$76,749.00 (Defendant's Exhibit 1, Tr. 132, 114, Rosebush deposition 18). This indebtedness was on his two certain promissory notes as follows: A note dated November 30, 1932, in the principal amount of \$25,000.00 with interest thereon at 6% from date and another note dated December 19, 1932, in the principal amount of \$75,000.00 with interest thereon at 6% from date. The Investment and Securities Co. is a collection and liquidating organization for the benefit of the depositors of The Old National Bank of Spokane, a national banking association of Spokane, Washington, and as such acquired these Rosebush promissory notes of 1932. (Tr. 132, St. 7, Rosebush deposition 2). On April 22, 1936, the Investment and Securities Co. had sold all of the collateral securing this indebtedness, including some 820 shares of the Inland Empire Paper Company stock. A year later the liquidator Investment and Securities Co. had discovered the fact that Rosebush had paid assessments on certain shares of the Exchange National Bank, an insolvent national banking association, and had likewise ascertained that the Exchange National Bank might pay its creditors in full and possibly have something to pay over to former stockholders who had paid their assessments, such as Rosebush. (Tr. 114, St. 7 and 8). On April 20, 1937, Rosebush had submitted an offer of \$820.00 in cash for the 820

shares of stock of the Inland Empire Paper Company (Plaintiff's Ex. A), and at the same time the Investment and Securities Co. attempted to get an assignment of his claim against the Exchange National Bank and threatened legal action as to the balance of his indebtedness if they did not receive it. Finally, Rosebush assigned to the Investment and Securities Co. on July 27, 1937, any recovery which might be made on the assessment which he had paid on his stock of the Exchange National Bank and received in return certain opportunities to reacquire the 820 shares of Inland Empire Paper Company common stock and a surcease from the legal action which had been threatened on April 28, 1937. (Defendant's Ex. 1, Plaintiff's Ex. A).

This action was originally commenced by Charles P. Robbins, Shareholders' Agent for the shareholders of the Exchange National Bank of Spokane, Washington, in the nature of an interpleader.

The Shareholders' Agent paid into court \$4,250.00 and prayed that the Investment and Securities Co., hereinafter called intervening plaintiff, and the United States Attorney and his deputies at Milwaukee, Wisconsin, be enjoined from suing the Shareholders' Agent (complaint in intervention, Tr. 4). However, the Shareholders' Agent claims no part of this fund and should have no interest in this appeal as all parties stipulated that the attorney fees awarded out of the fund might be fixed by the Court without submission of testimony. (Tr. 129).

Rosebush had paid assessments in 1929 on his shares in the Exchange National Bank, a National

Banking Association, which had become insolvent. A deficiency had been assessed by the United States against Rosebush for income taxes due for the calendar year 1928. This assessment had appeared on the Commissioner's assessment list of February, 1934, which was received by the Collector of Internal Revenue at Milwaukee, Wisconsin, on February 18, 1934. On February 27, 1934, written notice and demand for payment had been served upon Rosebush, (Defendant's Exhibits 16 E and F), and a second notice was served March 23, 1934, (Defendant's Exhibits 16 F). On April 14, 1934, a warrant for distraint to the Deputy Collector for the District of Wisconsin was issued (Defendant's Exhibit 16 G). Notices of tax lien were filed in 1934 by the Collector in the District of Wisconsin, Milwaukee, Wisconsin, in Outagamie County, Appleton, Wisconsin (defendant's exhibit 16-I) and in Iron County, Michigan, (Plaintiff's exhibit D, defendant's exhibit 16-I), (St. 23, Tr. 129). However, it is admitted that no notice of tax lien was ever filed in Washington either with the Clerk of the Federal District Court for the Eastern District of Washington, or the County Auditor of Spokane County, Washington, (Tr. 17, 99, pleadings and pre-trial order January 19, 1943). It is likewise undisputed that there was never any attempt to enforce the statutory lien arising out of Revised Statute, Sec. 3186, as amended by 613, Revenue Act of 1928, 26 U. S. C. A. Internal Revenue Acts, page 461, by either the defendant Frank J. Kuhl, Collector of Internal Revenue for Wisconsin, or the United States of America, additional intervenor, on any property

of the taxpayer in Washington until November 27, 1941 when an alleged writ of fieri facias was issued by the Clerk of the United States District Court for the Eastern District of Wisconsin under date of November 27, 1941, commanding the United States Marshal for the Eastern District of Washington, Northern Division, to levy upon certain "goods and chattels, lands and tenements" in his district of the said Judson G. Rosebush on account of a judgment entered November 26, 1941, in the Eastern District of Wisconsin for \$37,220.85, plus costs. (Answer of United States, Exhibit A). This writ was served December 1, 1941, on the Shareholders' Agent of the Exchange National Bank, who commenced this action the following day. The writ was never served upon the Investment and Securities Co.

At the time the Exchange National Bank of Spokane failed on January 19, 1929, Judson G. Rosebush was the owner of 250 shares of the capital stock of that bank and by reason thereof paid to the receiver of that bank assessments on his stock totaling \$25,000.00, which payments were made as follows:

Oct. 5, 1929.....	\$5,000.00
Dec. 12, 1929.....	5,000.00
Feb. 3, 1930.....	5,000.00
June 2, 1930.....	<u>10,000.00</u>
Mar. 25, 1931, interest on deferred payments	^{25 00 0} 1,590.20

Subsequent to these payments and subsequent to the execution of the contract of July 27, 1937, Charles P. Robbins, as Shareholders' Agent of said bank, paid certain liquidating dividends to other share-

holders who paid their superadded liability, but withheld the liquidating dividends due on account of assessments paid by Judson G. Rosebush. The date and percentages of the payments made by the Shareholders' Agent up to the time this action was brought were as follows:

July 5, 1940	7%
Dec. 20, 1940	4%
Dec. 10, 1941	6%
(Tr. 14, 21, 32, admitted by pleadings).	

Meanwhile on July 27, 1937, as previously stated, Rosebush had assigned to the Investment and Securities Co. for a then good and valuable consideration, any recovery which might be made by him or on his behalf on account of these assessments paid by him on account of the Exchange National Bank stock; this assignment was contained in a written agreement, pertinent part of which reads as follows:

“The party of the second part further agrees to and does hereby assign to party of the first part as security to the balance of indebtedness owing by the party of the second part to the party of the first part any recovery which may be made by or on behalf of party of the second part from or on account of an assessment paid on stock of Exchange National Bank, Spokane, Washington, and further agrees to make, execute and deliver to party of the first part any further instruments or documents necessary needful and proper to make this assignment for collateral purposes effective and to enable party of the first part to recover any amounts which may or shall be due by reason of the payment of such assessments on said Exchange National Bank stock. It is understood that the Collector of Internal Revenue has filed an Order of Distrain-

against party of the second part and that this assignment is subsequent and junior to any lien against said recovery that said Collector of Internal Revenue may have acquired by virtue of such Order of Distrainment."

This assignment of July 27, 1937, was served upon the Shareholders' Agent on March 14, 1938. (Pre-trial order Jan. 19, 1943). There was present consideration given. (Plaintiffs Ex. A & C). The Investment and Securities Co. never conceded that the Collector did acquire any lien as to the recovery on the assessment of the stock of Exchange National Bank of Spokane, Washington, by virtue of distraint proceedings in Wisconsin.

Rosebush at that time understood the position of the Investment and Securities Co.—that the Government's lien had not attached to the property in Washington represented by Rosebush's claim for recovery against the Shareholders' Agent of the Exchange National Bank and consequently was not considered by Investment and Securities Co. as actually existing as a prior claim (Tr. 157, St. 14, Plaintiff's Ex. C, Rosebush Deposition 11, 12, 20, Defendant's Ex. 4). Investment and Securities Co. never agreed nor admitted that the Government's claim was prior to its own (Tr. 122, St. 16), and always considered that it had a right as a creditor of Rosebush and as a liquidator for the depositors of The Old National Bank of Spokane to whatever assets of Rosebush it could obtain (Tr. 124, St. 16, 17), and acted on advice of counsel in this regard (Tr. 125, St. 18). On the other hand, Rosebush apparently never revealed to the Govern-

ment the position of the Investment and Securities Co. and never turned over to the Collector of Internal Revenue in Milwaukee Investment and Securities Co.'s letter of April 28, 1937 (Plaintiff's Ex. A) outlining the Investment and Securities Co.'s position or a copy of his own letter of May 8, 1937 (Plaintiff's Ex. C) acceding to that position, because he was hopeful of effecting a compromise between the Government and himself of his income tax indebtedness (Tr. 139, 152, 155, 156, Rosebush Deposition 12, 25, 28, 29). Indeed, as far back as April 6, 1937, Rosebush had told the Investment and Securities Co. that he was hoping to compromise the Government's claim (Tr. 162, Rosebush Deposition 36, Defendant's Ex. 3). There was no question but that Rosebush received value in return for his assignment of his claim against the Exchange National Bank Stock (Tr. 114, St. 7, 8, Plaintiff's Ex. A & C.)

By one of the terms of the contract of July 27, 1937, Rosebush was given certain opportunities to reacquire 820 shares of Inland Empire Paper Company common stock, and to make agreements respecting other paper companies' stock in consideration for assigning to the Investment and Securities Co. as security to the balance of his indebtedness all the recovery which might be made on the assessment of his stock of the Exchange National Bank of Spokane, Washington. (Defendant Ex. 1, Plaintiff Ex. A). The indebtedness of Rosebush at that time to Investment and Securities Co. was in excess of \$76,000.00.

(Tr. 114, St. 7). In addition Rosebush then averted the threatened legal action. (Plaintiffs Ex. 9, Tr. 165).

At the time of the execution of the contract of July 27, 1937, the controlling statute, Revised Statutes, Sec. 3186 as amended by §613, Revenue Act of 1928, 26 U. S. C. A. Internal Revenue Acts, page 461, was as follows:

“such lien shall not be valid as against any mortgagee, purchaser or judgment creditor until notice thereof has been filed by the Collector—”

This section remained in force until it was amended by Section 401 of the Revenue Act of 1934 by which amendment the word “pledgee” was inserted immediately following the word “mortgagee.” The complete section as amended is found in 26 U. S. C. A. 3672 and this pertinent part was pleaded in the complaint of intervening plaintiff.

Finally, Rosebush never gave the United States Government or the Commissioner of Internal Revenue any waiver or agreement in writing that would toll the statute of limitations of six years within the meaning of Internal Revenue Code, Sec. 276 (c), Title 26, U. S. C. A. 276 (c) (Tr. 163, Rosebush Deposition 35). More than six years elapsed from the time of filing of the assessment list with the Collector of Internal Revenue at Milwaukee, Wisconsin, on February 18, 1934, (when the tax lien arose) until November 27, 1941, when the Collector attempted to levy in Washington on property assigned to appellant by Rosebush on July 27, 1937.

SPECIFICATION OF ERRORS

(1) The District Court erred in rendering and entering the final judgment and in concluding and holding in support thereof

“That the right of the intervening plaintiff, Investment and Securities Company, was junior to and inferior to the tax lien of the United States.” (Conclusion of Law 1, Tr. 230)

since the United States had failed to enforce its statutory lien against the property in Washington through the Collector's failure to file in Washington notice of the lien pursuant to 26 U. S. C. A. Internal Revenue Code Sec. 3672 (a) and for the further reason that such lien in any event became unenforceable by reason of lapse of time pursuant to 26 U. S. C. A. Internal Revenue Code Sec. 3671.

(2) The District Court erred in rendering and entering the final judgment and in concluding and holding in support thereof

“The additional intervenor, United States of America, had a tax lien against the right to participate in the dividends of the Shareholders of The Exchange National Bank, which Judson G. Rosebush assigned to the intervening plaintiff, Investment and Securities Company.” (Conclusion of Law II, Tr. 230)

because the object of the additional intervenor, United States, was not to enforce a common law remedy in the collection of an admitted indebtedness of a tax imposition on Judson G. Rosebush by the Collector of Internal Revenue of Wisconsin for 1928 income

tax, the validity of which imposition was not challenged by intervening plaintiff, but to enforce a statutory lien under Revised Statutes, Sec. 3186 as amended by Section 613 Revenue Act of 1928, 26 U. S. C. A. Internal Revenue Code, page 461, against property in Washington which was once the property of Rosebush, but which at the time of the action was in the possession of the court and in the ownership of intervening plaintiff; because neither the Collector of Internal Revenue for Wisconsin nor additional intervenor, United States of America, complied with the prerequisites of the law to enforce such statutory lien as against mortgagees or purchasers by filing notice of the lien in the State of Washington.

(3) The District Court erred in rendering and entering the final judgment and in concluding and holding in support thereof conclusion of law No. III (Tr. 231)

“The right to participate in the dividends of the Shareholders of the Exchange National Bank was a property right, although in February, 1934, it was unliquidated and the amount undetermined and belonged to Judson G. Rosebush, and the lien of the United States attached thereto in February, 1934.”

because the right to participate in the dividends paid by the Shareholders' Agent of the Exchange National Bank was non-existent in February, 1934; because the claim of Judson G. Rosebush against said Shareholders' Agent which was assigned to Investment and Securities Co. was contingent upon the payment in whole or in part of said liquidating dividends to those

shareholders of said Exchange National Bank of Spokane who paid their superadded liability on said bank stock; that the first payment of such liquidating dividends was July 4, 1940, of 7%, and that prior to this time any property right was non-existent.

(4) The District Court erred in rendering and entering the final judgment and in concluding and holding in support thereof conclusion of law No. IV (Tr. 231)

“The Right to participate in the dividends of the Shareholders of The Exchange National Bank, was intangible personal property, and the lien of the United States attached thereto as a result of the United States filing its assessment list with the Collector of Internal Revenue, for the District of Wisconsin, and in filing a notice of the tax lien with the Clerk of Outagamie County, Wisconsin, where Judson G. Rosebush resided.”

because the lien of the United States arose when the assessment list was filed with the Collector of Internal Revenue for Wisconsin, but would not attach to property in Washington until a notice of the tax lien was filed in Washington; because the filing of a notice of tax lien in Wisconsin where Rosebush resided only affected property located there and not property in Washington; because the liability of the taxpayer Rosebush is one thing, and the creation and enforcement of a statutory lien for such tax against the property and claims of third parties is another and very different thing.

(5) The District Court erred in rendering and entering the final judgment and in concluding and

holding in part in support thereof conclusion of law No. V. (Tr. 231)

“That the United States shall be entitled to the sum of \$6,284.00 . . . ”

since the United States failed to enforce its lien, if any, before it became unenforceable by reason of lapse of time within the meaning of 26 U. S. C. A. Internal Revenue Code Sec. 3671 and 3672 and 26 U. S. C. A. Internal Revenue Code Sec. 276 (c).

(6) The District Court erred in rendering and entering the final judgment and in concluding and holding in support thereof conclusion of law No. VI. (Tr. 231)

“That future payments covered by the right to participate in the dividends of the Shareholders of The Exchange National Bank, and payable to Judson G. Rosebush, shall be paid to the additional intervenor, United States of America.”

for the reasons hitherto set forth by appellant with respect to conclusions of law I to V inclusive.

ARGUMENT

I.

PERIOD OF LIEN

The assessment list relative to Rosebush's 1928 income taxes was received by the Collector of Internal Revenue at Milwaukee, Wisconsin, February 18, 1934 (Tr. 98, Pretrial Order, p. 2, Defendant's Ex. 16). The lien of the tax arose with the filing of the assessment list (§3186 Rev. Stat. as Amended by Act of May 29, 1928, Chap. 852; §613, 45 Stat. 875).

Under this section the Government's lien arose on February 18, 1934, but would only become valid as against the taxpayer Rosebush's mortgagees, purchasers, and judgment creditors on the date when notice of tax lien was filed in the proper state office where the taxpayer's property was located. Under the express provisions of the controlling statute (Rev. Stat. §3186 as Amended by §613 Revenue Act of 1928; 26 U. S. C. A. [Internal Revenue Acts,] page 461), which is as follows:

“(a) . . . Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the Collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

“(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the Collector . . . ”

notice of the lien was required to be filed where the property subject to the lien was situated, that is, in Spokane, Washington. No lien was filed by the United States Government or the Collector of Internal Revenue either with the County Auditor of Spokane County or in the office of the Clerk of the United States District Court for the Eastern District of Washington. Notice of lien was filed in Wisconsin in the district wherein Rosebush had his domicile (defendant's Ex. 16) prior to the assignment of Rosebush to appellant as found by the court (Finding of Fact I), but this was not enough under the statute.

A tax has only such lien or priority as is given it by statute. (*In re Wiley Co.*, 292 Fed. 900). The Federal income tax lien granted by the quoted statute is a general lien and is not necessarily preferred over other liens. (*Exchange National Bank of Tulsa v. Davy*, Internal Revenue Act of 1928, §13 (a); 26 U. S. C. A. §1560-1562, 13 F. Supp. 226). This Federal income tax lien can arise but once. It had only one effective date of beginning, and that was February 18, 1934. To say that this lien arises at one time as against Rosebush and at another time as against third parties such as the Investment and Securities Co. would ignore the essential nature of liens. (*United States v. Security National Bank*, 30 F. Supp. 113 at 116).

Certainly, there can be but one time that the lien could attach to property in the State of Washington, and that is when the provisions of the statute have been followed with respect to property in Washington.

The Government itself in the case of the *United States v. Rosebush*, 45 F. Supp. 664, recognized this principle that it must follow the statute strictly and file and record the tax lien every place it believed there was property. For example, on April 20, 1934, notice of tax lien was filed and recorded with the Auditor of Outagamie County, Appleton, Wisconsin. On December 17, 1934, similar notice of tax lien was filed with the Register of Deeds in Iron County, Michigan. (Tr. 129, St. 23, Plaintiff's Ex. D).

II.

ASSIGNMENT OF CHOSE IN ACTION PROTECTED BY STATUTE

The Investment and Securities Co., was a mortgagee, or at least a purchaser. Sec. 3186 of Rev. Stat. as amended by §613 of the Revenue Act of 1928, 26 U. S. C. A. Internal Revenue Acts, page 461, provided in part that

“(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the Collector . . . ”

Subsequent to the execution of the agreement dated July 27, 1937, and in 1939 this statute was amended by inserting the word “pledgee” immediately following the word “mortgagee.” The complete section as amended is found in 26 U. S. C. A. 3672 and the pertinent part was pleaded in the complaint of intervening plaintiff, Investment and Securities Co. (Tr. 11, Comp. of Intervening Plaintiff).

Appellant has found only two Federal cases where this question was discussed in connection with the statute prior to its 1939 amendment which are helpful in determining whether the Investment and Securities Co. occupied the position of a mortgagee or a purchaser. The decision of *Exchange National Bank of Tulsa vs. Davy*, 13 Fed. Supp. 226) is squarely in point. One Davy executed an assignment assigning all of the assets of a trust estate as collateral security for indebtedness owing by him, which assignment was prior to the filing of the Government's tax lien. It was held that the holder of this assignment had an equitable lien, which would not have to be recorded to make it effective, the Court saying at page 228:

“In the instant case, the equitable lien arose by the assignment of the trust, and the trust property consisted of a chose in action, not real property, when given. No recording was required of such an assignment. The assignment became effective upon the trustee when notice of it was given; the beneficiary could not have effectively assigned the trust property to another after the first assignment, because the trustee, the legal title holder of the trust property, would have been bound to respect the first assignment. When the government filed notice of the tax lien, such lien attached to the trust property, subject to the rights of the assignee, the plaintiff herein.”

This Court will keep in mind that in the case at bar no notice of the tax lien was ever filed in Washington. (Tr. 99, Pre-trial Order of Jan. 19, 1943).

In another case (*Equitable Life Assurance Society vs. Moore*, 29 Fed. Supp. 179) decided prior to the

1939 amendment of the word "pledgee," the United States District Court for the Eastern District of Illinois held that the assignee of certain shares of stock held as collateral security for the payment of a loan came within the type of creditor which the statute, 26 U. S. C. A. 3672, was intended to protect.

Prior to the 1939 amendment, under the decisions of the Supreme Court of the State of Washington an assignment of a chose in action for collateral purposes was a proper means of securing an indebtedness and was given the same force and effect as a chattel mortgage as concerns the rights of third parties. The words "mortgagee" and "purchaser" as they appear in the Federal statute under consideration are not defined. Judge Schwollenbach, sitting in the District Court for the Eastern District of Wisconsin, also rendered the decision in the case of the *United States vs. Rosebush*, 45 Fed. Supp. 664, and at page 667 stated: "Since the word purchaser is not defined by the statute, this Court must turn to the State law in determining its meaning."

In *Bellingham Bay Boom Co. vs. Brisbois*, 14 Wash. 173; 46 Pac. 238, the Washington Supreme Court held that an assignment of an account being sued upon for collateral purposes was superior to a subsequent garnishment, saying:

"We think an assignment of a chose in action in good faith and for value, and with no intent to hinder, delay, or defraud creditors or subsequent purchasers, is complete and effectual as against third persons upon its execution and delivery to the assignee, and does not require any

additional force and validity by notice to the debtor.”

In *Hermans vs. Blakely*, 97 Wash. 647, 167 Pac. 128, it was held that Rem. Code §3659 providing that chattel mortgages may be made “upon all kinds of personal property” refers to tangible property that may be taken into possession, and not to intangible property, such as accounts and income and choses in action (overruling on rehearing, *id.* 93 Wash. 595, 161 Pac. 489). In that case the Washington Supreme Court pointed out that an assignment of future accounts receivable could be superior and prior to a subsequent garnishment.

Recognizing that intangible choses in action are often of great value and should be available to owners for security purposes, the Washington Supreme Court has consistently upheld the validity of such a chose in action for collateral purposes and has upheld the rights of the assignee as against third parties. No recording of such an assignment as in the case at bar is necessary to give it validity in our State courts. The Washington Supreme Court said in *Hughes Inc. vs. Widders*, 187 Wash. 452, 60 P. (2d) 243, at page 455:

“If the assignment was of a chose in action, it was not necessary that it be executed and filed as a chattel mortgage, because the statute covering the manner of the execution and filing of chattel mortgage refers to tangible property which may be taken into possession.”

The same Court had previously held in *Cox v. Bateman*, 139 Wash. 135, 245 Pac. 915, that an assignment

of all of the proceeds that the assignor might receive in a lawsuit, which assignment had been given for collateral purposes, had priority over a subsequent garnishment. However, the United States District Court in the case at bar considered that the written assignment of July 27, 1937, from Rosebush to appellant could not be regarded as a mortgage, for the reason that there was no affidavit of good faith or compliance with the chattel mortgage statute, and narrowed the primary question in the case down to whether on July 27, 1937, (the date of the assignment to appellant) the Government had a lien against the right which Rosebush assigned (Tr. Trial Court's Opinion).

In holding that the appellant could not recover, the United States District Court decided that the Investment and Securities Co. was a pledgee and hence not within the provision of 26 U. S. C. A. 3672, for the reason that the word "pledgee" was not inserted until the Act was amended on June 29, 1939. In so deciding, the United States District Court, we respectfully submit, did not consider the decisions of the State Supreme Court to the effect that an assignment of a chose in action for collateral purposes is a proper means of securing an indebtedness. Such assignee should be given the same protection as a mortgagee or purchaser under the Federal statute.

Furthermore, the United States District Court apparently did not consider as significant the fact that the assignee, Investment and Securities Co., gave valuable consideration for the assignment of the

chose in action. Rosebush, the assignor, received in return certain opportunities to reacquire the 180 shares of Inland Empire Paper Company common stock which had been foreclosed a year before, as well as other concessions regarding other paper companies stock, and a surcease from the legal action with which he had been threatened by Investment and Securities Co. on April 28, 1937 (defendant's exhibit 1, plaintiff's exhibit A).

It was most appropriately said by Judge Schwollenbach in *United States vs. Rosebush*, 45 Fed. Supp. 664, "The term purchaser embraces every person to whom any interest or estate shall be conveyed for a valuable consideration. *Butler vs. Bank of Mazeppa*, 94 Wisc. 351; 68 N. W. 998. A valuable consideration may consist of either some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. *Onsrud vs. Paulsen*, 219 Wisc. 1; 261 N. W. 541."

This granting of repurchase privileges for stock and forbearance to sue was valuable and sufficient consideration for the assignment of the chose in action to appellant by Rosebush. Restatement of Law, Contracts Sect. 76, 77 and 81 infra.

III.

FEDERAL INCOME TAX LIEN HAS NO INHERENT
SPECIAL PRIORITY

The Federal tax lien is a general one and not necessarily preferred over other liens. (*In re Wiley Co.*, 292 Fed. 900; *Exchange National Bank of Tulsa v. Davy*, 13 F. Supp. 226).

Section 3186 of the Revised Statutes as amended by Section 613 of the Revenue Act of 1929 does not provide for any special priority as between such liens and other liens such as the lien of appellant. Congress in specifically providing for income tax assessment and collection formulated and established a complete code of procedure, but it is well settled that in order to support and enforce a statutory lien for taxes all the requisites of the statute granting the lien must be strictly followed with respect to the claim of a creditor intended to be covered by the statute; the lien is not created by the statute itself without any action on the part of the collector. Every requirement of 26 U. S. C. A. 3672 as to filing notice of lien must be met by the collector. The Federal Statute makes provision for distraint by the collector outside his district. 26 U. S. C. A. Sec. 3713. The question in this case is not the liability of the delinquent taxpayer. The appellant alleged "that your complainant and petitioner does not challenge the validity of any tax imposition on said Judson G. Rosebush by said defendant Collector of Internal Revenue for Wisconsin." (Tr. 13 Complaint in Intervention, §VII).

The language of *United States v. The Pacific Railroad et al.* 1 Fed. 97 at 102, is singularly apropos in describing the efforts of the Government to subject the fund in Washington to the lien which arose in Wisconsin:

“Here the object is not to enforce a common law remedy in the collection of an admitted indebtedness, but to enforce a statutory lien against property which was once the property of the debtor but is now in the possession and ownership of others. It is well settled that, in order to support and enforce a statutory lien for taxes, all the prerequisites of the laws granting the lien must be strictly complied with * * * The lien is not created by the law itself without any action by officers under the law, though a debt be thus created. The liability of the taxpayer is one thing; the creation and enforcement of a lien, especially against innocent parties, is another and very different thing.”

The Federal statute does not define “purchasers.” Appellant had actual notice of a claim of the United States at the time the July 27, 1937, assignment was made, but gave value for the assignment. Appellant had been informed by Rosebush that he was hoping to settle his tax liability with the Government. Rosebush testified as follows on his deposition:

“(Re-Direct Examination by Mr. Kelley)

“Q. Did you ever tell the Investment and Securities Co. that satisfactory arrangements would be made by you to pay the United States Government?

“A. I told them I was hoping to make a contemplated settlement with the Internal Revenue Department.

“Q. When did you tell them that?

“A. I think that was along in 1937--1936.”
(Tr. 162).

Rosebush wrote appellant a letter on April 6, 1937, in which he expressed the opinion that he was not free to assign his equity in the Exchange National Bank stock but also stated concerning his tax liability “On the other hand, I am hoping presently to get that out of the way, but until I do I wonder if it would not be premature to make any agreement regarding that item.” (Defendant’s Ex. 3).

The answers of the Government and Collector set up five affirmative defenses, including the allegations that the agreement of July 27, 1937, was procured by wrongful acts, conduct and representations to Rosebush. There was not a shred of evidence adduced in support of such allegations and this defense sounding in tort was apparently abandoned at the time of trial as no evidence was offered. However, irrespective of this, actual knowledge of the Government’s claim will not defeat a prior lien where the Government does not file notice of its lien. It has been held that where a chattel mortgage on growing wheat to secure a note given for a pre-existing debt was filed the day before notice of the Federal Government’s tax lien was filed, the mortgage lien had priority over the tax lien, *notwithstanding mortgagor and mortgagee knew that the tax had been assessed and intended that the mortgage lien have preference.* (Italics ours). *Schmitz v. Stockman*, 101 P. (2d) 962. Again it has been held that a mortgage lien was entitled to priority

over the Government's tax lien upon mining properties where the tax lien notice was not filed pursuant to state law until long after the mortgage had been executed and recorded, and the only notice of tax lien filed in the district court was filed in the wrong district, *notwithstanding that the mortgagee knew at the time of execution of the mortgage that mortgagor owed taxes.* (Italics ours). *United States v. Beaver Run Coal Co.* 99 F. (2d) 610.

On July 27, 1937, appellant on advice of counsel (Tr. 125, St. 18) did not concede that the Collector of Internal Revenue for Wisconsin had acquired a lien on the chose in action in Washington for recovery on account of assessment on the bank stock of the Exchange National Bank of Spokane, Washington, because (1) there was then no property in existence; (2) there was no notice filed under the Washington state law; (3) even if the collector's lien were senior by virtue of filing notice of it in Wisconsin, the collector still had to enforce it within six years of February 18, 1934, and he might fail to do so, since three years of that time had already run; (4) Investment and Securities had no knowledge of any waiver signed by Rosebush extending the period of limitation upon assessment and collection and in fact there was none (Tr. 125, 126, 163, St. 18, 19 and 35).

The Federal statutes provided, first, for a summary method for enforcement of tax lien on both personal and real property by distraint and sale, and made provisions for distraint by a collector outside his district (26 U. S. C. A. Sec. 3713, 3678). The

position of appellant is not, we submit, unjust toward the Government. As it was said in *United States v. Pacific Railroad*, 1 Fed. 97 at 100:

“Nor is it unjust toward the government, for it is fair to presume that the Government, armed as it is with so many agencies and appliances for ascertaining what taxes are due and unpaid, and from whom, and all-powerful as it is to enforce its rights, will, within reasonable time, make demand, or take some steps in the direction of making collections, in all cases where there is delinquency.”

Sixty-three years later, the same principle was recognized in *United States v. Morris & Essex R. Co.*, 135 F. (2d) 711, when L. Hand, Circuit Judge, held that a “tax claim” is not like an ordinary claim and plaintiff need not wait for judgment in order to levy execution since it can distrain after notice and demand. An assessment was held the equivalent of a judgment for purposes of collection within the meaning of 26 U. S. C. A. Internal Revenue Code, Secs. 3690, 3710.

IV.

FEDERAL INCOME TAX LIEN NEVER ESTABLISHED IN WASHINGTON

The lien created by the provisions of Revised Statutes Sec. 3186 (a), as amended by Act of May 29, 1928, 26 U. S. C. A. Sec. 367, is a purely statutory creation and is in effect a judgment in favor of the United States against the tax debtor. Since the lien is a statutory lien, its character, operation and extent must be ascertained from the terms of the statute.

The 1928 amendment made a most significant change in language. It provided that the lien should “continue until the liability for such amount is satisfied, or *becomes unenforcible by reason of lapse of time.*” (Italics ours). It was said in the case of *United States v. Beaver Run Coal Company*, 99 F. (2d) 610 at page 612 in referring to certain statutes:

“Whether a statute creating a lien is to be given a liberal or a strict construction, it is well established that ‘the character, operation and extent of the lien must be ascertained from the terms of the statute which creates and defines it, and the lien will extend only to persons or conditions provided for by statute, and then only where there has been at least a substantial compliance with all the statutory requirements.’ 37 C. J. 309, 322, 323; *In re Brunquest*, 4 Fed. Cas. p. 482, No. 2,055; *The Suelco*, D. C., 286 F. 286; *Gile v. Atkins*, 93 Me. 223, 44 A. 896, 74 Am. St. Rep. 341. Positive legislative enactments prescribing conditions essential to the existence and preservation of a statutory lien cannot be disregarded. *Augustine v. Congregation of Holy Rosary of Pompeii*, 231 Wis. 517, 252 N. W. 271.”

The general rule as to the construction of statutory liens is found in 33 Am. Jur., 432 (liens), Sections 25 and 26. The language therein contained is as follows:

“25. *Validity.*—Liens created by statute are ordinarily governed by and find their efficacy within the provisions of their foundation, and their validity is entirely dependent on the terms of the statute. It is within the power of the legislature to provide for liens to secure the payment of debts and other obligations, subject to constitutional limitations . . .

“26. *Construction and Application of Statutes.*— . . . It may here be stated generally that where

a lien is provided for by a statute which is merely declaratory of the common law, it must be interpreted in conformity with its principles. On the other hand, where the legislature has enlarged and defined a common-law lien, its definition supersedes the definition of the courts, and thereafter, the exercise of the powers of the courts with respect to such liens must be consistent with the legislative definition. *A lien created by statute is limited in operation and extent by the terms of the statute, and can arise and be enforced only in the event and under the facts provided for in the statute; it cannot be extended by the courts to cases not provided for by the statute, nor can it be substituted by a bond . . .*” (Italics ours).

It was held in the case of *Bull v. United States*, 55 S. Ct. 695, 295 U. S. 247, that the assessment made by the Collector is given the force of a judgment, the Court saying:

“ . . . The assessment supersedes the pleading, proof, and judgment necessary in an action at law, and has the force of such a judgment. The ordinary defendant stands in judgment only after a hearing. The taxpayer often is afforded his hearing after judgment and after payment, and his only redress for unjust administrative action is the right to claim restitution. But these reversals of the normal process of collecting a claim cannot obscure the fact that after all what is being accomplished is the recovery of a just debt owed the sovereign.”

The Government itself, in the case of the *United States vs. Rosebush*, 45 Fed. Supp. 664, recognized that it had to follow the statute and file and record its tax lien every place it believed there was property. For example, on April 20, 1934, notice of tax lien

was filed and reported with the Auditor of Outagamie County at Appleton, Wisconsin. On December 17, 1934, a similar notice of tax lien was filed with the Register of Deeds in Iron County, Michigan, (defendant's exhibit 16). The Federal statutes provided collection authority for the Collector of Internal Revenue of Wisconsin to have transferred his assessment to Washington or any other place outside his district where Rosebush might have real or personal property liable to be seized and sold for tax (26 U. S. C. A. 3651). Such statutory steps were never taken in the case at bar.

1. The situs of the claim for recovery on account of the assessments paid on the Exchange National Bank stock of Spokane, Washington, was in Washington despite the fact that the actual stock certificates were in Wisconsin. The Exchange National Bank was in Washington.

2. All interested parties except Rosebush are in Washington.

3. A practical interpretation of the Federal statute should impel the Court to hold the situs of the chose in action to be in Washington despite the fact that Rosebush was a citizen of Wisconsin. Any other interpretation would compel the Exchange National Bank or any other National Banking Association to check the records in the various states at the domicile of every stockholder before paying dividends, or at least the records in the various states of the domicile of every stockholder who had paid the superadded liability.

COLLECTION OF THE TAX BARRED BY THE STATUTE
OF LIMITATIONS

Regardless of whether Investment and Securities Co. came within the protection of the Revenue Act of 1928 when the agreement of July 27, 1937, was executed, nevertheless the claim for tax lien on the recovery on the assessment of the Exchange National Bank stock owned by Rosebush, which was never made in Washington until a writ of fieri facias was issued in December, 1941, by the Federal District Court for the Eastern District of Wisconsin, to be served on the Shareholders' Agent of said Bank in Washington, was barred by the Statute of Limitations, as set forth in Internal Revenue Code, Section 276 (c), Title 26 U. S. C. A., Section 276 (c), which provides:

“Collection after assessment. Where the assessment of any income tax imposed by this chapter has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. 53 Stat. 87.”

This Court will remember that Rosebush did not sign any agreement to the effect that the amounts assessed might be collected from him by distraint or

by a court proceeding commenced at any time, (Tr. 163) as did the taxpayer in the recent case of *Citizens National Trust and Savings Bank of Los Angeles vs. the United States*, 135 F. (2d) 527. There the appellant could raise no question as to the effect of the waiver of the statute of limitations which it was acknowledged the taxpayer had signed. In that case this Court indicated that a correct interpretation of Revised Statutes Section 3186 as amended by Section 613, Revenue Act of 1928, lies in the comparison of a Federal tax lien and a judgment lien. This Court has stated:

“An analogy between the two may be drawn in accordance with the theory of *Bull vs. the United States*, 295 U. S. C. A. 247; 55 Supreme Court 695; 79 L. Ed. 1421, that a Federal tax has the effect of a judgment.”

The Federal tax in the case at bar arose February 18, 1934. Under the specific provisions of the Internal Revenue Code, §276 (c), Title 26 U. S. C. A., §276 (c), the period of limitations for collection of that tax lien expired February 18, 1940. If Rosebush had signed a waiver or executed any writing that would extend the period of limitation beyond February 18, 1934, the appeal on this point would not have been taken. But the trial court did not pass upon the question of the Statute of Limitations at all, although the Statute was affirmatively pleaded (Tr. 105, amended reply) and Rosebush had testified as follows:

“Q. Now did you as a taxpayer ever give the United States Government a waiver in connection with an offer to compromise this claim of

theirs you have testified to for income for the year 1928?

“A. Not that I can recall.

“Q. You never gave them a waiver.

“A. Not so far as I can recall.”

(Tr. 163 Rosebush deposition 35).

And neither the Government nor the Collector of Internal Revenue for Wisconsin adduced any testimony to show that the period of limitation had been extended by a subsequent agreement in writing made before the expiration of the period.

On the other hand, the record shows that a prima facie case at least was made to the effect that title to the chose in action was vested in appellant, a non-taxpayer, on July 27, 1937, and that there was never any effective establishment of any Federal tax lien at any time and the purported levy on an intangible chose in action was made subsequent to February 18, 1940.

Certainly under such circumstances a court of equity may enjoin the attempted seizure of property by a writ of fieri facias issued seven years after the tax lien arose, particularly since the Federal statutes provide for a summary method for the enforcement of tax liens on both personal and real property by distraint and sale and make provision for distraint by a collector outside of his district. (26 U. S. C. A. 3713, 3678, *Filipowicz v. Rothensies*, 31 F. Supp. 716).

With reference to the period of six years after assessment of the tax as being the Statute of Limitation

provided for in Internal Revenue Code 276 (c), Title 26 U. S. C. A., §276 (c), it has been held that the "sole purpose of this enactment was to fix a time beyond which 'steps to enforce collection' might not be initiated." *United States vs. Havner*, 101 F. (2d) 161, 165. Such a provision, when contained in a tax statute, is to be construed liberally in favor of the taxpayer. *United States vs. Updike*, 281 U. S. 489, 496; 50 S. Ct. 367; *Bowers vs. New York and Albany Lighterage Co.*, 273 U. S. 346, 349; 47 S. Ct. 389. In the latter case it was held that a law barring "suits" and "proceedings" for a collection of income and excess profits tax after five years barred collection by distraint proceedings under Revenue Act of 1921, Sec. 250 (d). The part of the Act that has a bearing follows:

"No suit . . . or proceeding for the collection of any such taxes . . . shall be begun after the expiration of five years after the date when such return is filed."

The petition there insisted that the word "proceeding" referred only to a proceeding in court and meant the same as "suit" and that the act prescribed no limits against the collection of such taxes by distraint. It apparently was conceded that the collection of taxes by a judicial proceeding would come within the meaning of the statute. The Supreme Court, in discussing the methods of compelling payment of taxes and the purpose of the Statute of Limitations, said:

"There are two methods to compel payment. One is suit, a judicial proceeding; the other is distraint, an executive proceeding. The word

“proceeding” is aptly and commonly used to comprehend steps taken in pursuit of either. There is nothing in the language or context that indicates an intention to restrict its meaning, or to use “suit” and “proceeding” synonymously.

“The purpose of the enactment was to fix a time beyond which steps to enforce collection might not be initiated. The repose intended would not be attained if suits only were barred, leaving the collector free at any time to proceed by distraint. In fact distraint is much more frequently resorted to than is suit for the collection of taxes. The mischiefs to be remedied by setting a time limit against distraint are the same as those eliminated by bar against suit. Under petitioner’s construction taxpayers having no property within reach of the collector would be protected against stale demands, while others would be liable to have their property distrained and sold to pay like claims. The result tends strongly to discredit petitioner’s contention.”

In the *Updike* case a six-year limitation on a court proceeding to collect a tax was held applicable to a suit to recover corporation taxes brought against stockholders as transferees of a defunct corporation’s assets under Revenue Act 1926 Sec. 278 (a) (d), 280. The principal difference there was whether a suit having been brought more than six years after the assessment was barred by the following provision of Sec. 278:

“(d) Where the assessment . . . has been made (whether before or after the enactment of this act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by proceeding in court (begun before or after the enactment of this act), but only if begun (1) within six years after the

assessment of the tax . . . ” 26 U. S. C. A. 1058, 1069.

A comparison of the language shows that it corresponds to the present 26 U. S. C. A. 276 (c) that was affirmatively pleaded by the intervenor in the case at bar (amended reply). It would seem that, if the period of limitation has run in favor of Rosebush, as to property in Washington, it has run in favor of his transferees. In the Updike case the Court said on page 369:

“It follows that, if by section 278 (d) the period of limitation had run in favor of the corporation, it had run in favor of the transferees. The contention of the government that the section does not apply under the facts of the present case depends upon the meaning of the phrase which we have italicized: ‘Where the assessment . . . has been made . . . *within the statutory period of limitation properly applicable thereto*, such tax may be collected . . . by a proceeding in court . . . but only if begun (1) within six years after the assessment of the tax . . . ’ The argument in effect, is this: in 1920 when the assessment was made, there was, and had been, no provision of law which in any form limited the time for assessing or collecting taxes, and therefore an assessment in 1920 of 1917 taxes could not fulfill the requirements of section 278 (d), because, in that view, there was no ‘statutory period of limitation properly applicable thereto;’ and, assuming the applicability of statutes passed after 1920, the provision in these statutes is that the assessment may be made ‘at any time,’ and that is not a *period* of limitation within the meaning of Section 278 (d), for the word ‘period’ connotes a stated interval of time commonly thought of in terms of years, months, and days.”

The clear intent of Section 276 (c) as applied to the facts of the present case was to designate the extent of time for the *enforcement* of the tax liability. The Wisconsin action was a proceeding begun within six years after assessment, but no such proceeding to enforce collection was brought in Washington within six years. The statutes to collect the tax provide for a proceeding either by distraint or by court action. Here neither method was pursued in Washington within the six-year bar.

This Court will bear in mind that the amount and validity of the assessment of February 18, 1934, are not challenged, but appellant contends that Rosebush, never having signed a waiver within the meaning of Internal Revenue Code, Section 276 (c), Title 26 U. S. C. A., Section 276 (c), (Tr. 163) could make a valid assignment of a chose in action on July 27, 1937, in Washington that would have precedence over a tax lien concerning which there were no steps to enforce in Washington within six years of its inception. (Tr. 99).

CONCLUSION

It is the contention of appellant, Investment and Securities Co., that the lien given the United States under the statutory provisions hereinabove set forth is purely a statutory one and is limited strictly to the right given by the language of the statute; that said lien arose with the filing of the assessment list with the Collector of Internal Revenue in Milwaukee, Wisconsin, on February 18, 1934; that said lien never was established in Washington although the lien became in effect a judgment in favor of the United States which gave the United States the right to pursue property by a distraint or by a court proceeding under the pertinent statutory provisions hereinabove set forth at any time within six years from February 18, 1934. In the instant case no lien was ever established in Washington where the property was located. Therefore it should be determined that the right, title and interest of the appellant, Investment and Securities Co., is prior and superior to the unenforcible lien of the Federal Government and that the decree in the instant case should so provide.

Respectfully submitted,

WITHERSPOON, WITHERSPOON AND KELLEY,
WILLIAM V. KELLEY,

Attorneys for Appellant.

No. 10540

United States
Circuit Court of Appeals
For the Ninth Circuit.

ARON ROSENSWEIG and
ABE ROSENSWEIG,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

DEC - 6 1943

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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RAY H. KINNISON, Assistant United States
Attorney

600 U. S. Post Office and Court House Bldg.

Los Angeles 12, Calif. [1*]

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 15th day of July in the year of our Lord one thousand nine hundred *and three*.

Present: The Honorable: C. E. Beaumont, District Judge.

No. 16,108—Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARON ROSENSWEIG and
ABE ROSENSWEIG,

Defendants.

ORDER THAT INFORMATION BE FILED
AND FIXING BOND

On motion of R. F. Duni, Esq., Assistant U. S. Attorney; appearing for the Government, who presents an Information to the Court in this cause, it is ordered that the said Information be filed, that the bond of each of the defendants Aron Rosensweig and Abe Rosensweig be, and it hereby is, fixed in the sum of \$1,000.00 and that a bench warrant be issued for the apprehension of the said defendants. F. M. Harvey, reporter, present and reporting the proceedings. [2]

\$1,000 Bond B/W

This Information contains six (6) Counts charging Aron Rosensweig and Abe Rosensweig with the violation of Revised Maximum Price Regulation No. 169 and Revised Maximum Price Regulation No. 148, issued pursuant to the Emergency Price Control Act of 1942. (The maximum penalty on each Count consists of one (1) year imprisonment and/or a fine of Five Thousand Dollars (\$5,000) or both, with no minimum penalty provided).

ARON ROSENSWEIG

2501 East Vernon,
Vernon, California

ABE ROSENSWEIG

2501 East Vernon
Vernon, California [3]

In the District Court of the United States, Southern
District of California, Central Division

No. 16108 Crim.

UNITED STATES OF AMERICA,

Plaintiff.

vs.

ARON ROSENSWEIG, and
ABE ROSENSWEIG,

Defendants.

INFORMATION

Comes now Charles H. Carr, United States Attorney in and for the Southern District of California,

Central Division, who for the United States and in its behalf, prosecutes in his own proper person, and with leave of Court first had and obtained, gives the Court here to understand and be informed as follows, to-wit: [4]

COUNT ONE

all but 1 & 3
dismissed

That on or about the 7th day of May, 1943, in the City of Long Beach, County of Los Angeles, State of California, in the district aforesaid and in the Central Division thereof and within the jurisdiction of this Court, Aron Rosensweig, and Abe Rosensweig, doing business as the Central Packing Company, did knowingly, wilfully and unlawfully offer for sale, sell and deliver to E. E. Surhart at 501 Daisy Avenue, Long Beach, California, one side of U.S. Grade A beef weighing 296 pounds for the sum of \$88.91, which said side of U.S. Grade A beef weighing 296 pounds had a maximum price of \$68.18 under the provisions of Revised Maximum Price Regulation 169 (7 Fed. Reg. 10381) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942; contrary to the form and effect of the statute in such case made and provided and against the peace and dignity of the United States of America (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942). [5]

COUNT TWO

That on or about the 7th day of May, 1943, in the City of Long Beach, County of Los Angeles, State of California, in the district aforesaid and in the Central Division thereof and within the jurisdiction of this Court, Aron Rosensweig, and Abe Rosensweig, doing business as Central Packing Company, did wilfully, knowingly and unlawfully fail and neglect to make and preserve complete and accurate records of the sale of one side of U. S. Grade A beef weighing 296 pounds to E. E. Surhart, showing the date thereof, the name and address of the buyer, the quantity and grade of said side of U. S. Grade A beef and the price charged or received therefor, in that defendants made an entry in the records of the Central Packing Company on Central Packing Company Invoice No. 9698 dated May 7, 1943, showing the sale of said side of U. S. Grade A beef to E. E. Surhart for the price of \$68.18, while the actual price charged and received for said side of U. S. Grade A beef was \$88.91; all of which facts as to the price charged and received for said side of Grade A beef were known to the defendants at the time of the making of said invoice; that said entry on said invoice was false at the time of making of said record, in violation of the provisions of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942; contrary to the form and effect

of the statute in such case made and provided and against the peace and dignity of the United States of America (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942). [6]

COUNT THREE

That on or about April 15, 1943, in the City of Long Beach, County of Los Angeles, State of California, in the District aforesaid and in the Central Division thereof, and within the jurisdiction of this Court, Aron Rosensweig and Abe Rosensweig, doing business as Central Packing Company, hereinafter called "the defendants", did make a sale of certain meat products to E. E. Surhart; that said defendants did knowingly, wilfully and unlawfully give a false invoice covering said sale of said meat products, in that said defendants did give an invoice covering said sale on Central Packing Company invoice No. 9373, dated April 15, 1943, showing the total price charged and received for the meat products listed on said invoice No. 9373 to be \$164.71, whereas in truth and in fact, as the defendants then and there well knew, the total price charged and received for the meat items shown in invoice No. 9373 was \$189.46, in violation of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942, and in violation of Revised Maximum Price Regulation No. 148 (7 Fed. Reg. 8609) as amended,

issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942 (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. [7]

COUNT FOUR

That on or about April 24, 1943, in the City of Long Beach, County of Los Angeles, State of California, in the District aforesaid and in the Central Division thereof, and within the jurisdiction of this Court, Aron Rosensweig and Abe Rosensweig, doing business as Central Packing Company, hereinafter called "the defendants", did make a sale of certain meat products to E. E. Surhart; that said defendants did knowingly, wilfully and unlawfully give a false invoice covering said sale of said meat products, in that said defendants did give an invoice covering said sale on Central Packing Company invoice No. 9439, dated April 24, 1943, showing the total price charged and received for the meat products listed on said invoice No. 9439 to be \$292.13, whereas in truth and in fact, as the defendants then and there well knew, the total price charged and received for the meat items shown in invoice No. 9439 was \$354.46, in violation of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant

to Section 2 of the Emergency Price Control Act of 1942, and in violation of Revised Maximum Price Regulation No. 148 (7 Fed. Reg. 8609) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942 (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. [8]

COUNT FIVE

That on or about May 25, 1943, in the City of Long Beach, County of Los Angeles, State of California, in the District aforesaid and in the Central division thereof, and within the jurisdiction of this Court, Aron Rosensweig and Abe Rosensweig, doing business as Central Packing Company, hereinafter called "the defendants", did wilfully, knowingly and unlawfully fail and neglect to make and preserve complete and accurate records of the sale of one U. S. Grade A beef carcass, weighing 538 pounds, to Powell & Dinsmore, Long Beach, California, showing the date thereof, the name and address of seller, the grade and weight of said U. S. Grade A beef carcass, and the price charged or received therefor, in that defendants made an entry in the records of Central Packing Company on Central Packing Company invoice No. 9698, dated May 25, 1943, showing the sale of said Grade A beef carcass to Powell & Dinsmore for the price of \$123.75, while

the actual price charged and received for said Grade A beef carcass was \$161.40, all of which facts as to the price charged and received for said U. S. Grade A beef carcass were known to the defendants at the time of the making of said invoice; that said entry on said invoice was false at the time of making *aid* records, in violation of the provisions of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381), as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942 (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. [9]

COUNT SIX

That on or about May 7, 1943, in the City of Long Beach, County of Los Angeles, State of California, in the District aforesaid, and in the Central Division thereof, and within the jurisdiction of this Court, Aron Rosensweig and Abe Rosensweig, doing business as Central Packing Company, hereinafter called "the defendants", did make a sale of certain meat products to Arrow Meat Company, of Long Beach, California; that said defendants did knowingly, wilfully and unlawfully give a false invoice covering said sale of said meat products, in that said defendants did give an invoice covering said sale on Central Packing Company invoice No. 9556, dated

May 7, 1943, showing the total price charged and received for the meat products listed on said invoice No. 9556 to be \$184.52, whereas in truth and in fact, as the defendants then and there well knew, the total price charged and received for the meat items shown on invoice No. 9556 was \$206.70, in violation of Revised Maximum Price Regulation No. 148 (7 Fed. Reg. 8609) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942 (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Wherefore, said United States Attorney prays that process of this Court be issued against Aron Rosensweig and Abe Rosensweig and that they be dealt with according to law.

CHARLES H. CARR

United States Attorney

By CHARLES H. VEALE

Assistant United States

Attorney [10]

VERIFICATION

State of California

County of Los Angeles

United States of America—ss.

George Vallance, being first duly sworn, upon oath deposes and says:

That he is an employee of the United States Government, to-wit, an Investigator for the Office of Price Administration, an agency of the United States Government; that in the course of his duty as in Investigator for the Office of Price Administration he made an investigation of the matters set forth and mentioned in the above and foregoing Information against Aron Rosensweig and Abe Rosensweig; that he has read the above and foregoing Information and knows the contents thereof and that the matters set forth therein are true to the best of his knowledge and belief.

GEORGE VALLANCE

Subscribed and Sworn to before me this 14th day of July, 1943

[Notarial Seal] ESTHER BLAISDELL

Notary Public in and for the County of Los Angeles, State of California

My Commission Expires May 14, 1946

[Endorsed]: Filed July 15, 1943. [11]

[Title of District Court and Cause.]

DEMURRER

The defendants, Aron Rosensweig and Abe Rosensweig, demur to the information herein upon the following grounds:

1. That said information and each and every count thereof do not state facts sufficient to consti-

tute an offense against the United States or the laws thereof.

2. That the affidavit supporting the information set forth in counts 1, 2, 3, 4, 5 and 6 is not sufficiently definite so as to inform the defendants as to whether or not affiant was personally present at the time the alleged acts set out in said counts were committed.

3. That the counts setting forth the information, mainly counts 1, 2, 3, 4, 5 and 6, do not sufficiently state whether or not the sales were made by the defendants jointly, or by one of the defendants, or by one of the defendants acting as the agent of the other defendant or of both of them.

4. That the Emergency Price Control Act of 1942, upon [12] which the information is based, is an improper use of the war power by Congress and is also an improper delegation by Congress of its legislative function to an administrative agency.

5. That the Emergency Price Control Act of 1942 and the Revised Maximum Price Regulation No. 169 and the Revised Maximum Price Regulation No. 148 deprive defendants of their rights under the fourth amendment and the fifth amendment to the Constitution of the United States of America.

Wherefore, defendants demand judgment dismissing the information and discharging them from custody.

Yours respectfully,

SAMUEL MIRMAN

Attorney for demurring defendants.

Dated: July 27, 1943.

To: Charles H. Carr, Esq.,
United States Attorney

POINTS AND AUTHORITIES IN SUPPORT
OF DEMURRER

1. The U. S. District Court can pass on the constitutionality of any act of Congress.

Brown v. O'Connor 49 Federal Supplement
943

2. By fixing price of commodity to be sold at an arbitrary figure derived by the Office of Price Administrator, the defendants are deprived of their property without due process of law.

Fourth Amendment to the Constitution of
United States of America.

Fifth Amendment to the Constitution of
United States of America.

3. If information is made the basis of arrest, there must be a supporting affidavit setting forth the facts on which the information is based.

Weeks v. United States 216 F 292.

Volner v. United States 2 F2nd 551.

[Endorsed:] Filed Jul. 27, 1943. [13]

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the

Court Room thereof, in the City of Los Angeles on Monday the 2nd day of August in the year of our Lord one thousand nine hundred *and three*.

Present: The Honorable Ben Harrison District Judge.

[Title of Cause.]

No. 16,108-Crim.

PLEA OF NOT GUILTY

This cause coming on for hearing on motion of defendants to quash the Information herein, plea in abatement, demurrer to Information, and for plea of the defendants; Ray Kinnison, Esq., Assistant U. S. Attorney, appearing for the Government; Samuel Mirman, Esq., appearing as counsel for the defendants; John Q. Bybee, Court Reporter, being present and reporting the proceedings; the defendants Aron Rosensweig and Abe Rosensweig being present in Court:

Attorney Kinnison states he submits the case without argument; Attorney Mirman argues to the Court as to the law of this case; the Court makes a statement and orders said motion to quash, plea in abatement, and demurrer, overruled; an exception is allowed each defendant to the rulings of the Court.

Each defendant now enters his separate plea of not guilty to the six charges contained in the Information, and it is ordered that this cause be, and it hereby is, set for trial for August 13, 1943, at 10 A. M., before a jury. [14]

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 11th day of August in the year of our Lord one thousand nine hundred *and three*.

Present: The Honorable Ben Harrison District Judge.

[Title of Cause.]

No. 16,108-Crim.

PLEA OF GUILTY ON COUNTS 1 AND 3

This cause coming on for change of plea of the defendants Aron Rosensweig and Abe Rosensweig; Ray Kinnison, Esq., Assistant U. S. Attorney, appearing for the Government; Samuel Mirman, Esq., appearing as counsel for the defendants; C. W. McClain, Court Reporter, being present and reporting the proceedings; the said defendants being present in court on bond:

On motion of Attorney Mirman, John W. Preston, Esq., is associated as counsel for the defendants.

Attorney Preston makes a statement. With the permission of the Court and U. S. Attorney, each of the said defendants now changes his plea from not guilty to guilty to counts 1 and 3, and it is ordered that this cause be, and it hereby is, referred to the Probation Officer for investigation and report, and that hearing thereon and sentence on counts 1 and 3 is continued to August 30, 1943, at 10 A. M.

Counts 2, 4, 5, and 6 are ordered off calendar. [15]

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 30th day of August in the year of our Lord one thousand nine hundred *and three*.

Present: The Honorable: Ben Harrison District Judge.

[Title of Cause.]

No. 16,108-Crim.

HEARING ON REPORTS OF PROBATION OFFICER

This cause coming on for hearing on reports of the Probation Officer and sentence of the defendants Aron Rosensweig and Abe Rosensweig on counts 1 and 3 of the Information herein; Ray H. Kinnison, Esq., Assistant U. S. Attorney, appearing for the Government; Samuel Mirman and John W. Preston, Esqs., appearing as counsel for the defendants; H. A. Dewing, Court Reporter, being present and reporting the proceedings; the defendants being present in Court; Attorney Preston makes a statement on behalf of the defendants; Attorney Kinnison makes a statement; the Court makes a statement and pronounces judgment against the defendants as follows: [16]

District Court of the United States, Southern District of California, Central Division.

No. 16108 Criminal Information in six counts for violation of U.S.C., Title

UNITED STATES

vs.

ARON ROSENSWEIG

Secs. Emergency Price Control Act of 1942.

JUDGMENT AND COMMITMENT

On this 30th day of August, 1943, came the United States Attorney, and the defendant Aron Rosensweig appearing in proper person, and by his attorneys, Samuel Mirman and John W. Preston, Esqs., and,

The defendant having been convicted on his plea of Guilty of the offense charged in the Information in the above-entitled cause, to wit: Count one; did knowingly, wilfully and unlawfully offer for sale, sell and deliver to E. E. Surhart, one side of beef for sum \$88.91, which side of beef had a maximum price of \$68.18; etc., and Count three; did knowingly, wilfully and unlawfully give a false invoice No. 9373, to E. E. Surhart, etc., as more fully set forth in the said two counts of the Information; and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the

contrary being shown or appearing to the Court, it
Is By the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of thirty (30) days in a jail and pay a fine unto the United States of America in the sum of One thousand (\$1000.) Dollars on count one; and it is further ordered that the imposition of sentence on count three is suspended for the period of two (2) years and defendant is placed on probation for said period of two years commencing at the expiration of the sentence on count one on the condition that the defendant shall not wilfully violate any of the price regulations or any law made to supercede them, and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that execution of the above judgment is stayed for the period of five days from today at 10 A. M. Counts 2, 4, 5 and 6 are ordered dismissed.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein on count one.

(Signed)

BEN HARRISON

United States District Judge.

Rec'd 9-2-43.

[Endorsed:] Filed Aug 30, 1943. [17]

District Court of the United States, Southern District of California, Central Division.

No. 16108 Criminal Information in six counts for violation of U.S.C., Title

UNITED STATES

vs.

ABE ROSENSWEIG

Secs. Emergency Price Control Act of 1942.

JUDGMENT AND COMMITMENT

On this 30th day of August, 1943, came the United States Attorney, and the defendant Abe Rosensweig appearing in proper person, and by his attorneys, Samuel Mirman and John W. Preston, Esqs., and,

The defendant having been convicted on his plea of Guilty of the offense charged in the Information in the above-entitled cause, to wit: Count one; did knowingly, wilfully and unlawfully offer for sale, sell and deliver to E. E. Surhart, one side of beef for sum \$88.91, which side of beef had a maximum price of \$68.18; etc., and Count three; did knowingly, wilfully and unlawfully give a false invoice No. 9373, to E. E. Surhart, etc., as more fully set forth in the said two counts of the Information; and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By the Court

Original
in three
als

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby ordered to pay a fine unto the United States of America in the sum of one thousand (\$1000.) dollars on count one; and it is further ordered that the imposition of sentence on count three is suspended for the period of two (2) years and defendant is placed on probation for said period of two years after the payment of said fine on count one on the condition that the defendant shall not wilfully violate any of the price regulations or any law made to supercede them and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that execution of the above judgment is stayed for the period of five days from today at 10 A. M. Counts 2, 4, 5 and 6 are ordered dismissed.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein if said fine on count one is not paid.

(Signed)

BEN HARRISON

United States District Judge.

Rec'd. 9-2-43.

[Endorsed:] Filed Aug 30, 1943. [18]

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thurs. the 2nd day of Sept. in the year of our Lord one thousand nine hundred *and three*.

Present: The Honorable Ben Harrison District Judge.

[Title of Cause.]

No. 16,108-Crim.

ORDER DENYING PLEA TO WITHDRAW
PLEA OF GUILTY AND ALSO STAYING
SENTENCE FOR FIVE DAYS.

This cause coming on for hearing on motion of defendants for an order vacating judgments, setting aside sentences, granting defendants the right to withdraw their plea of guilty and to re-enter their pleas of not guilty, and for a new trial, pursuant to notice and motion filed August 31, 1943; Chas. H. Carr, Esq., United States Attorney, and Ray H. Kinnison, Esq., Assistant U. S. Attorney, appearing for the Government; John W. Preston and Samuel Mirman, Esqs., appearing as counsel for the defendants; C. W. McClain, Court Reporter, being present and reporting the proceedings; Attorney Preston is called, sworn, and testifies, and argues; Attorney Carr argues; Attorney Preston argues further. It is ordered that this matter stand submitted.

Later, it is ordered that motion of defendants for order vacating judgments and setting aside sentences, motion of defendants for order granting defendants the right to withdraw their plea of guilty, and to re-enter their pleas of not guilty, and motion for a new trial, be, and the same hereby are, denied; exception to defendants.

It is ordered that execution of sentences of defendants be, and it hereby is, stayed for an additional period of five days. [19]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant:

Aron Rosensweig, 2501 East Vernon Avenue, Los Angeles, California.

Name and Address of Appellant's Attorneys:

John W. Preston and Samuel Mirman, 712 Rowan Building, 458 South Spring Street, Los Angeles, California.

Offense: Violation of Emergency Price Control Act of 1942, 56 Stat. 23, January 30, 1942. Count One: Did knowingly, wilfully and unlawfully offer for sale, sell and deliver to E. E. Surhart, one side of beef for sum \$88.91, which side of beef had a maximum price of \$68.18; etc., and Count Three: Did knowingly, wilfully and unlawfully give a false invoice No. 9373, to E. E. Surhart, etc., as more fully set forth in the said two counts of the Information.

Date of Judgment: August 30, 1943. [20]

Brief Description of Judgment or Sentence:

That defendant is guilty of the offense as charged in Counts One and Three of the Information and Counts 2, 4, 5 and 6 dismissed; that defendant be imprisoned for thirty (30) days in a jail and pay a fine unto the United States of America in the sum of One Thousand (\$1000.00) Dollars on Count One; and it is further ordered that the imposition of sentence on Count Three is suspended for the period of two (2) years and defendant is placed on probation for said period of two years commencing at the expiration of the sentence on Count One on the condition that the defendant shall not wilfully violate any of the price regulations or any law made to supercede them.

Name of Prison Where Now Confined If Not on Bail:

Remanded and now held by United States Marshall.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

I elect not to enter upon the service of sentence pending appeal.

Dated: September 3rd, 1943.

ARON ROSENSWEIG

Appellant

GROUND OF APPEAL:

1. That the Information and each count thereof fail to charge a public offense against the laws of the United States of America.

2. That the trial court should have sustained appellant's demurrer to the Information and to each count thereof.

3. That the Information and each count thereof fail to state facts sufficient to constitute a public offense against the laws of the United States of America.

4. That the trial court should have granted appellant's motion to quash the Information.

5. That the Emergency Price Control Act of 1942 (56 Stats. 23, [21] January 30, 1942) and particularly Sections 2 and 201, are void as an attempted delegation of legislative power to an Administrator in violation of Article One, Section One of the Constitution of the United States of America.

6. That the Emergency Price Control Act of 1942 and particularly Section 2 thereof, in delegating power to the Price Administrator to establish and maintain maximum prices for commodities, violates Article One, Section One, of the Constitution of the United States of America and is void in that it fails to prescribe adequate standards to guide the Administrator in the exercise of the power granted.

7. The Emergency Price Control Act, as applied to appellant, denies him due process of law in derogation of the Fifth Amendment to the Constitution of the United States of America, and is therefore unconstitutional and void.

8. That Maximum Price Regulation 169, promulgated by the Price Administrator, fixing maximum wholesale prices for beef, is violative of the Fifth Amendment to the Constitution of the United States and void in that the Administrator, in fixing such prices, failed to give due consideration to the various factors affecting cost of production and distribution of meat in the industry as a whole.

9. That the Emergency Price Control Act of 1942 denies appellant the due process of law guaranteed him by the Fifth Amendment to the Constitution of the United States in that by Secs. 203 and 204(d) of said Act, the forum in which appellant is prosecuted for a violation of said Act and the Maximum Price Regulation promulgated pursuant thereto, is precluded from questioning the validity of said Act and Regulation.

10. That the Emergency Price Control Act of 1942, and particularly sections 2 and 3 thereof, are as to appellant void in that arbitrary, unreasonable and discriminatory classifications of commodities and prices are created in violation of the Fifth Amendment to the [22] Constitution of the United States.

11. That Maximum Price Regulation 169, for a violation of which appellant was convicted, deprives appellant of due process of the Fifth Amendment to the Constitution of the United States in that said Regulation unlawfully classifies appellant as a wholesaler of a commodity processed from an agricultural commodity.

12. That the failure of the Price Administrator to fix or regulate the price of livestock prior to promulgating Maximum Price Regulation 169, for a violation of which appellant was convicted, rendered said Regulation invalid because in violation of the Fifth Amendment to the Constitution of the United States.

13. That the trial court was without jurisdiction to enter said judgment and sentence as to Appellant because of the promises made to the Appellant by the Assistant United States District Attorney that the Probation Officer, if Appellant would plead guilty to two counts, would recommend to the Judge of said Court that a fine of not to exceed One Hundred Twenty-five (\$125.00) Dollars on each Count of the Information so plead to by Appellant, would be imposed.

14. That the trial court erred and committed an abuse of discretion in refusing to vacate the judgment and sentence as to Appellant, grant him a new trial, and permit him to withdraw his plea of guilty and enter a plea of not guilty to each Count of the Information.

[Endorsed]: Filed Sept. 3, 1943. [23]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant:

Abe Rosensweig, 2501 East Vernon Avenue, Los Angeles, California.

Name and Address of Appellant's Attorneys:

John W. Preston and Samuel Mirman, 712 Rowan Building, 458 South Spring Street, Los Angeles, California.

Offense: Violation of Emergency Price Control Act of 1942, 56 Stat. 23, January 30, 1942. Count One: Did knowingly, wilfully and unlawfully offer for sale, sell and deliver to E. E. Surhart, one side of beef for sum \$88.91, which side of beef had a maximum price of \$68.18; etc., and Count Three: Did knowingly, wilfully and unlawfully give a false invoice No. 9373, to E. E. Surhart, etc., as more fully set forth in the said two counts of the Information.

Date of Judgment: August 30, 1943. [24]

Brief Description of Judgment or Sentence:

That defendant is guilty of the offense as charged in Counts One and Three of the Information and Counts 2, 4, 5 and 6 dismissed; that defendant pay a fine unto the United States of America in the sum of One Thousand (\$1,000.00) Dollars on Count One; and that the imposition of sentence on Count Three is suspended for the period of two (2) years and defendant is placed on probation for said period of two years after the payment of said fine on Count One on the condition that the defendant shall not

wilfully violate any of the price regulations or any law made to supercede them.

Name of Prison Where Now Confined If Not on Bail:

Remanded and held by the United States Marshall if said fine on Count One is not paid within five days.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

I elect not to enter upon the service of sentence pending appeal.

Dated: September 3rd, 1943.

ABE ROSENSWEIG

Appellant

GROUND OF APPEAL:

1. That the Information and each count thereof fail to charge a public offense against the laws of the United States of America.

2. That the trial court should have sustained appellant's demurrer to the Information and to each count thereof.

3. That the Information and each count thereof fail to state facts sufficient to constitute a public offense against the laws of the United States of America.

4. That the trial court should have granted appellant's motion to quash the Information.

5. That the Emergency Price Control Act of

1942 (56 Stats. 23, [25] January 30, 1942) and particularly Sections 2 and 201, are void as an attempted delegation of legislative power to an Administrator in violation of Article One, Section One of the Constitution of the United States of America.

6. That the Emergency Price Control Act of 1942 and particularly Section 2 thereof, in delegating power to the Price Administrator to establish and maintain maximum prices for commodities, violates Article One, Section One, of the Constitution of the United States of America and is void in that it fails to prescribe adequate standards to guide the Administrator in the exercise of the power granted.

7. The Emergency Price Control Act, as applied to appellant, denies him due process of law in derogation of the Fifth Amendment to the Constitution of the United States of America, and is therefore unconstitutional and void.

8. That Maximum Price Regulation 169, promulgated by the Price Administrator, fixing maximum wholesale prices for beef, is violative of the Fifth Amendment to the Constitution of the United States and void in that the Administrator, in fixing such prices, failed to give due consideration to the various factors affecting cost of production and distribution of meat in the industry as a whole.

9. That the Emergency Price Control Act of 1942 denies appellant the due process of law guaranteed him by the Fifth Amendment to the Constitution of the United States in that by Secs. 203 and

204(d) of said Act, the forum in which appellant is prosecuted for a violation of said Act and the Maximum Price Regulation promulgated pursuant thereto, is precluded from questioning the validity of said Act and Regulation.

10. That the Emergency Price Control Act of 1942, and particularly Sections 2 and 3 thereof, are as to appellant void in that arbitrary, unreasonable and discriminatory classifications of commodities and prices are created in violation of the Fifth Amendment to the [26] Constitution of the United States.

11. That Maximum Price Regulation 169, for a violation of which appellant was convicted, deprives appellant of due process of the Fifth Amendment to the Constitution of the United States in that said Regulation unlawfully classifies appellant as a wholesaler of a commodity processed from an agricultural commodity.

12. That the failure of the Price Administrator to fix or regulate the price of livestock prior to promulgating Maximum Price Regulation 169, for a violation of which appellant was convicted, rendered said Regulation invalid because in violation of the Fifth Amendment to the Constitution of the United States.

13. That the trial court was without jurisdiction to enter said judgment and sentence as to appellant because of the promises made to the appellant by the Assistant United States District Attorney that the Probation Officer, if appellant would plead guilty to two counts, would recommend to the Judge

of said Court that a fine of not to exceed One Hundred Twenty-five (\$125.00) Dollars on each County of the Information so plead to by appellant, would be imposed.

14. That the trial court erred and committed an abuse of discretion in refusing to vacate the judgment and sentence as to Appellant, grant him a new trial, and permit him to withdraw his plea of guilty and enter a plea of not guilty to each Count of the Information.

[Endorsed]: Filed Sept. 3, 1943. [27]

[Title of District Court and Cause.]

PETITION FOR ORDER FIXING BAIL
PENDING APPEAL AND FOR ORDER
STAYING EXECUTION OF SENTENCE
TO PAY FINE PENDING BAIL

To the Honorable District Court of the United
States in and for the Southern District of Cali-
fornia, Central Division:

The petition of the defendants, Aron Rosensweig and Abe Rosensweig, respectfully shows:

1. That judgment was pronounced against them, and each of them, on the 30th day of August, 1943, upon their pleas of guilty to Counts One and Three of the Information on file in said cause; that the judgment as to defendant Aron Rosensweig was in substance as follows: That defendant is guilty of the offenses charged in Counts One and Three of

the Information, and that defendant be imprisoned for thirty (30) days in a jail and pay a fine unto the United States of America in the sum of One Thousand (\$1,000.00) Dollars on Count One; and it is further ordered that the imposition of sentence on Count Three is suspended for the period of Two (2) years and defendant is placed on probation for said period of two [28] years commencing at the expiration of the sentence on Count One on the condition that the defendant shall not wilfully violate any of the price regulations or any law made to supercede them.

That the judgment as to defendant Abe Rosensweig was in substance as follows: That defendant is guilty of the offenses charged in Counts One and Three of the Information and defendant is ordered to pay a fine unto the United States of America in the sum of One Thousand (\$1,000.00) Dollars on Count One; and it is further ordered that the imposition of sentence on Count Three is suspended for the period of two (2) years and defendant is placed on probation for said period of two years after the payment of said fine on Count One on the condition that the defendant shall not wilfully violate any of the price regulations or any law made to supercede them.

2. That on the 2nd day of September, 1943, the Court denied their respective motions for orders vacating judgments, setting aside sentences, granting defendants the right to withdraw their pleas of guilty and to re-enter their pleas of not guilty, and for a new trial.

3. That on the 3rd day of September, 1943, the defendants filed herein their respective notices of appeal.

4. That defendants have specified as their grounds for appeal the following, to wit:

(a) That the Court should have sustained the demurrers of defendants and granted their motions to quash the Information.

(b) That the Emergency Price Control Act of 1942 is an unlawful delegation of legislative power; that said Act and Maximum Price Regulation No. 169, promulgated pursuant thereto, deprive defendants of due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(c) That the Court deprived defendants of due process of law by its order denying defendant's motions to vacate judgment, sentence and permit the defendants and each of them to withdraw their pleas of guilty and enter their pleas of not guilty.

[29]

5. That the said appeals and each of them involve substantial questions of law which should be determined by an Appellate Court.

6. That the defendants have heretofore deposited in the registry of this Court the fines imposed upon them, to wit: The sum of One Thousand (\$1,000.00) Dollars each.

7. That it is proper in this case that the defendant Aron Rosensweig be admitted to bail for the sum of One Thousand (\$1,000.00) Dollars and that

the defendant Abe Rosensweig be allowed to go free upon his own recognizance pending said appeal.

8. That cost bonds in the sum of Two Hundred Fifty (\$250.00) each should authorize the Court to grant a stay of execution upon said judgments pending said appeal.

Wherefore, defendants pray for an order fixing bail for the defendants and each of them pending the appeal herein, and for an order staying the execution of sentence as to each of them to pay fines, and that such stay be in operation until the final determination of said appeals.

JOHN W. PRESTON and

SAMUEL MIRMAN

By JOHN W. PRESTON

Attorneys for Defendants.

[Endorsed]: Filed Sept. 7, 1943. [30]

[Title of District Court and Cause.]

ORDER ADMITTING DEFENDANTS TO BAIL
AND STAYING EXECUTION UPON THE
FINES IMPOSED UPON THEM

In this cause, it appearing to the Court that the defendants were convicted on the 30th day of August, 1943, upon Counts One and Three of the Information and the judgment of the Court was as follows:

That defendant Aron Rosensweig is guilty of the offenses charged in Counts One and Three of the Information, and that defendant be imprisoned for

thirty (30) days in a jail and pay a fine unto the United States of America in the sum of One Thousand (\$1,000.00) Dollars on Count One; and it is further ordered that the imposition of sentence on Count Three is suspended for the period of Two (2) years and defendant is placed on probation for said period of two years commencing at the expiration of the sentence on Count One on the condition that the defendant shall not wilfully violate any of the price regulations or any law made to supercede them.

That the judgment as to defendant Abe Rosensweig was in [31] substance as follows: That defendant Abe Rosensweig is guilty of the offenses charged in Counts One and Three of the Information and defendant is ordered to pay a fine unto the United States of America in the sum of One Thousand (\$1,000.00) Dollars on Count One; and it is further ordered that the imposition of sentence on Count Three is suspended for the period of two (2) years and defendant is placed on probation for said period of two years after the payment of said fine on Count One on the condition that the defendant shall not wilfully violate any of the price regulations or any law made to supercede them.

It further appearing that the defendants and each of them have duly filed herein their notices of appeal to the Circuit Court of Appeals, Ninth Circuit, and it further appearing that the said defendants and each of them have deposited in the registry of this Court the amount of said fines so imposed as

aforesaid, to wit: the sum of One Thousand (\$1,000.00) Dollars each.

By reason of the above and foregoing and upon good cause otherwise appearing.

It Is Now Hereby Ordered that the defendant Aron Rosensweig be admitted to bail during the pendency of his said appeal upon the giving of a bond executed by a qualified surety company in the sum of One Thousand (\$1,000.00) Dollars; that the defendant Abe Rosensweig be and he is hereby released upon his own recognizance pending said appeal. Defendants are to deposit \$1000 each in the registry of this court, pending appeal, to guarantee payment of the fines imposed, if the convictions are finally affirmed or if the appeals respectively be dismissed.

That the execution of the respective sentences to pay fines in said causes, be and the same is hereby stayed upon the execution by each of the defendants of a cost bond on appeal with the usual provisions and obligations in the sum of Two Hundred Fifty (\$250.00) Dollars.

Dated, Sept. 7, '43.

PAUL J. McCORMICK

Judge

[Endorsed]: Filed Sept. 7, 1943. [32]

[Title of District Court and Cause.]

BAIL BOND ON APPEAL

[Stamped in Margin]: This Bond shall be void if in excess of \$1,000.00.

[Stamped in Margin]: This Bond shall be void if issued after Sep 10 1943.

Know All Men By These Presents:

That I, Aron Rosensweig of the City of Los Angeles, California, as principal and the National Automobile Insurance Company, a corporation, as surety, are jointly and severally held firmly bound unto the United States of America in the sum of One Thousand and no/100 Dollars, for the payment of which said sum we and each of us bind ourselves, our heirs, executors, administrators and assigns.

The condition of the foregoing obligation is as follows:

Whereas, later, to-wit, on the 30 day of August, 1943, at a term of the District Court of the United States, in and for the Southern District of California, Central Division, in an action pending in said court in which the United States of America was plaintiff and Aron Rosensweig was defendant, a Judgment and sentence was made, given, rendered and entered against the said Aron Rosensweig, in the above entitled action whereas he was convicted as charged of violation of U.S.C. Title Emergency Price Control Act of 1942.

Whereas, in said judgment and sentence, so made, given, rendered and entered against said Aron Rosensweig, he was by said judgment sentenced to imprisonment for the period of thirty days in a jail and pay a fine unto the United States of America

in the sum of One Thousand Dollars all on count one and imposition of sentence on count three was suspended for two years and the defendant placed on probation for two years commencing at the expiration of the sentence on count one of the information. [33]

Whereas, the said Aron Rosensweig has filed a notice of appeal from the said conviction and from the said judgment and sentence, appealing to the United States Circuit Court of Appeals for the Ninth Circuit; and

Whereas, the said Aron Rosensweig has been admitted to bail pending the decision upon said appeal, in the sum of \$1,000.00.

Now, therefore, the condition of this obligation are such that if said Aron Rosensweig shall appear in person, or by his attorney, in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said court and prosecute his appeal; and if the said Aron Rosensweig shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit and if said Aron Rosensweig shall surrender himself in execution of said judgment and sentence, if the judgment and sentence be affirmed by the said United States Circuit Court of Appeals for the Ninth Circuit; and if the said Aron Rosensweig will appear for trial in the District Court of the United States, in and for the Southern District of

California, Central Division, on such day or days as may be appointed for retrial by said District Court, if the said judgment and sentence against him be reversed,

Then this obligation shall be null and void; otherwise to remain in full force and effect.

It is further agreed that the provisions of Rule 13 of the District Court for Summary Judgment against sureties are deemed a condition of this recognizance.

ARON ROSENSWEIG

Principal

2501 E Vernon Ave

Address

NATIONAL AUTOMOBILE INSURANCE COMPANY

By ED GROVES

Attorney-in-Fact

State of California,
County of Los Angeles—ss.

On this 7 day of September, in the year 1943, before me, James A. Mew, a Notary Public in and for said County and States, personally appeared Ed Groves, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the National Automobile Insurance Company, and acknowledged to me that he subscribed the name of the National Automobile

Insurance Company thereto as principal, and his own name at Attorney-in-fact.

[Seal]

JAMES A. MEW

Notary Public in and for said
County and State

My Commission Expires August 31, 1943 [34]

Approved as to form

RAY H. KINNISON

Asst. United States Attorney

I hereby certify that I have examined the within bond and that in my opinion the form hereof is correct and surety thereon is qualified.

JOHN W. PRESTON and

SAMUEL MIRMAN

By SAMUEL MIRMAN

Attorney for Defendant and
Appellant

The foregoing bond is approved this 8th day of Sept., 1943.

PAUL W. McCORMICK

United States District Judge

[Endorsed]: Filed Sept. 8, 1943. [35]

[Title of District Court and Cause.]

OBLIGATION OF ARON ROSENSWEIG

In this Cause it appearing to the Court that the defendant, Aron Rosensweig was convicted on the 30th day of August, 1943, upon Counts One

and Three of the Information and the judgment of the Court was as follows:

That defendant Aron Rosensweig is guilty of the offenses charged in Counts One and Three of the Information, and that defendant be imprisoned for thirty (30) days in a jail and pay a fine unto the United States of America in the sum of One Thousand \$(1,000.00) Dollars on Count One; and it further ordered that the imposition of sentence on Count Three is suspended for the period of two (2) years and defendant is placed on probation for said period of two years commencing at the expiration of the sentence on Count One on the condition that the defendant shall not wilfully violate any of the price regulations or any law made to supercede them.

It further appearing that the defendant Aron Rosensweig [36] has duly filed herein his notice of appeal to the Circuit Court of Appeals, Ninth Circuit, and it further appearing that the said defendant has deposited in the registry of this court the amount of said fine so imposed as aforesaid, to wit: The sum of One Thousand (\$1,000.00) Dollars, and

It further appearing by an order of the above court that the execution of the sentence to pay the aforementioned fine was stayed on September 7, 1943 upon the execution by the defendant of a cost bond on appeal with the usual provisions and obligations in the sum of \$250.00 and the said defendant having deposited co-incident herewith the

sum of \$250.00 in lieu of the cost bond provided above, and said defendant now agrees that the condition of the above obligation represented by the deposit of the \$250.00 in cash is such that if said defendant, Aron Rosensweig, shall prosecute his appeal to affect and answer all damages and costs if he failed to make his plea good, then the above obligation is void, else to remain in full force and effect. It is the intention of the said Aron Rosensweig that if the appeal filed as heretofore set out be dismissed or if the sentence resulting therefrom is finally affirmed that the clerk of said District Court be and hereby is authorized to apply said \$250.00, or such portion thereof as may be required, towards the payment of the costs on appeal properly chargeable to him by virtue of the aforementioned appeal and to turn over whatever sum is remaining therefrom to said defendant upon the completion and final judgment in the aforementioned appeal.

Dated: September 8, 1943.

ARON ROSENSWEIG

Defendant [37]

State of California

County of Los Angeles—ss.

On this 8th day of September, 1943, before me, Samuel Mirman, a Notary Public in and for said County and State, personally appeared Aron Rosensweig known to me to be the person whose name is subscribed to the within instrument and as acknowledged to me that he executed the same.

Witness my official hand and seal.

[Seal] SAMUEL MIRMAN

Notary Public in and for said
County and State

[Endorsed]: Filed Sept. 8, 1943. [38]

[Title of District Court and Cause.]

OBLIGATION OF ABE ROSENSWEIG

In this cause it appearing to the Court that the defendant, Abe Rosensweig, was convicted on the 30th day of August, 1943, upon Counts One and Three of the Information and the judgment of the Court was as follows:

That Defendant Abe Rosensweig is guilty of the offenses charged in Counts One and Three of the Information and defendant is ordered to pay a fine unto the United States of America in the sum of one Thousand (\$1,000.00) Dollars on Count One; and it is further ordered that the imposition of sentence on Count Three is suspended for the period of two (2) years and defendant is placed on probation for said period of two years after the payment of said fine on Count One on the condition that the defendant shall not wilfully violate any of the price regulations or any law made to supercede them.

It further appearing that the defendant, Abe Rosensweig, has duly filed herein his notice of appeal to the Circuit Court of [39] Appeals, Ninth Circuit, and it further appearing that the said de-

defendant has deposited in the registry of this court the amount of said fine so imposed as aforesaid, to wit: the sum of One Thousand (\$1,000.00) Dollars, and

It further appearing by an order of the above court that the execution of the sentence to pay the aforementioned fine was stayed on September 7, 1943, upon the execution by the defendant of a cost bond on appeal with the usual provisions and obligations in the sum of \$250.00 and the said defendant having deposited co-incident herewith the sum of \$250.00 in lieu of the cost bond provided above, and said defendant now agrees that the condition of the above obligation represented by the deposit of the \$250.00 in cash is such that if said defendant, Abe Rosensweig, shall prosecute his appeal to affect and answer all damages and costs if he failed to make his plea good, then the above obligation is void else to remain in full force and effect. It is the intention of the said Abe Rosensweig that if the appeal filed as heretofore set out be dismissed or if the sentence resulting therefrom is finally affirmed that the clerk of said District Court be and hereby is authorized to apply said \$250.00, or such portion thereof as may be required, towards the payment of the costs on appeal properly chargeable to him by virtue of the aforementioned appeal and to turn over whatever sum is remaining therefrom to said defendant upon the completion and final judgment in the aforementioned appeal.

Dated: September 8, 1943.

ABE ROSENSWEIG

Defendant

State of California

County of Los Angeles—ss.

On this 8th day of September, 1943 before me, Samuel Mirman, a Notary Public in and for said County and State, personally appeared Abe Rosensweig known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed [40] the same.

Witness my official hand and seal.

[Seal] SAMUEL MIRMAN

Notary Public in and for said
County and State

[Endorsed]: Filed Sept. 8, 1943. [41]

[Title of District Court and Cause.]

STIPULATION FOR CONSOLIDATION
OF APPEALS

It Is Hereby Stipulated by and between plaintiff and the appealing defendants, Aron Rosensweig and Abe Rosensweig, in the above entitled action, that the appeal of the respective filing defendants from the Judgments, and each of them, of the above entitled Court, made and entered in the above entitled cause against them, and each of them, on August 30, 1943, may be presented to the United States Circuit Court of Appeals, in and for the Ninth Circuit, as one appeal, and may be presented on one record, and prepared, presented and considered as the joint record of the filing defendants.

including one assignment of errors and one bill of exceptions.

Dated: September 16th, 1943.

CHARLES H. CARR,
United States Attorney
By CHARLES H. CARR,
Ass't. United States Attorney
for plaintiff
JOHN W. PRESTON & SAM-
UEL MIRMAN
By JOHN W. PRESTON,
Attorneys for defendants

[Endorsed]: Filed Sept. 16, 1943. [42]

[Title of District Court and Cause.]

ORDER FOR CONSOLIDATION OF APPEALS

It appearing that the plaintiff and appealing defendants in the above entitled action have stipulated that the appealing defendants may present their appeal on one record, and the necessity therefor appearing to this Court;

It Is Hereby Ordered that the defendants, Aron Rosensweig and Abe Rosensweig, may consolidate and present their respective appeals as one appeal, and that said appeals may be presented on one record and prepared, presented and considered as the joint record of the filing defendants, including one assignment of errors and one bill of exceptions.

Dated: September 16th, 1943.

PAUL J. McCORMICK

Judge

[Endorsed]: Filed Sept. 16, 1943. [43]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME TO FILE
BILLS OF EXCEPTIONS AND SPECIFI-
CATIONS OF ERRORS

It Is Hereby Stipulated by and between the defendants and the plaintiff in the above entitled action, that the defendants, Aron Rosensweig and Abe Rosensweig, may have up to and including the 2nd day of November, 1943, in which to prepare, serve and file their respective Bills of Exceptions and Assignment of Errors in the above entitled cause.

Dated: This 16th day of September, 1943.

CHARLES H. CARR,

United States Attorney

By CHARLES H. CARR

Ass't. United States Attorney
for plaintiff

JOHN W. PRESTON &

SAMUEL MIRMAN

By JOHN W. PRESTON

Attorneys for defendants

[Endorsed]: Filed Sept. 16, 1943. [44]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE BILLS
OF EXCEPTIONS AND SPECIFICA-
TIONS OF ERRORS

It appearing to this Court that the defendants and plaintiff in the above entitled action have stipulated that the defendants, Aron Rosensweig and Abe Rosensweig, may have up to and including November 2, 1943, in which to prepare, serve and file their respective Bills of Exceptions and Assignments of Errors in the above entitled cause, and the necessity appearing therefor to this Court;

It Is Hereby Ordered that the defendants, Aron Rosensweig and Abe Rosensweig, may have, and are hereby granted, up to and including November 2, 1943, in which to prepare, serve and file their respective Bills of Exceptions and Assignments of Errors in the above entitled cause.

Dated: September 16th, 1943.

PAUL J. McCORMICK

Judge

[Endorsed]: Filed Sept. 16, 1943 [45]

[Title of District Court and Cause.]

PRAECIPE

To Edmund L. Smith, Clerk, United States District
Court for the Southern District of California,
Central Division:

Please prepare a transcript of the record in the
above cause to be transmitted to the United States
Circuit Court of Appeals for the Ninth Circuit and
include therein the following:

1. The informations,
2. The demurrer,
3. Order overruling the demurrer, motion to
quash and plea in abatement and exceptions taken,
noted and allowed,
4. Pleas of defendants and rulings thereon,
5. Judgment and sentence,
6. Stays of execution on judgment and sentence,
7. Stipulation extending time to file assignments
of errors and of exceptions, [46]
8. Order extending time to file assignments of
errors and of exceptions,
9. Stipulation for consolidation of appeals,
10. Order for consolidation of appeals,
11. Order on motion to vacate judgment and
sentence and/or enter leave to plea of not guilty,
exception taken thereto, noted and allowed,
12. Notice of appeal,
13. Bill of exceptions (original),
14. Assignment of errors (original),
15. Copy of this praecipe,

16. All other orders and rulings of the trial court.

17. Probation reports and bonds.

JOHN W. PRESTON

SAMUEL MIRMAN

By: SAMUEL MIRMAN

Counsel for Appellants,

Aaron Rosensweig and

Abraham Rosensweig

Received copy of this praecipe this 4th day of November, 1943.

CHARLES H. CARR

United District Attorney for

the Southern District of

California, Central Division.

By: JAMES M. CARTER

Assistant U. S. District

Attorney

[Endorsed]: Filed Nov. 4, 1943. [47]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 47 inclusive contain full, true and correct copies of: Minute Order entered July 15, 1943; Information; Demurrer; Minute Orders Entered August 2, 1943, August 11, 1943 and

August 30, 1943 respectively; Judgment and Commitment as to defendant Aron Rosensweig; Judgment as to defendant Abe Rosensweig; Minute Order Entered September 2, 1943; Notices of Appeal; Petition for Order Fixing Bail Pending Appeal and for Order Staying Execution of Sentence to pay Fine Pending Bail; Order Admitting Defendants to Bail and Staying Execution upon the Fines Imposed upon Them; Bail Bond on Appeal; Obligations; Stipulation for Consolidation of Appeals; Order for Consolidation of Appeals; Stipulation Extending Time to File Bills of Exceptions and Specifications of Errors; Order Extending Time to File Bills of Exceptions and Specifications of Errors; and Praecipe, which, together with the Original Bill of Exceptions and Assignment of Errors transmitted herewith constitute the Record on Appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for comparing, correcting and certifying the foregoing record amount to \$9.15 which amount has been paid to me by appellants.

Witness my hand and the seal of said District Court this 12 day of November, 1943.

[Seal] EDMUND L. SMITH, Clerk

By THEODORE HOCKE

Deputy Clerk

[Title of District Court and Cause.]

BILL OF EXCEPTIONS BY DEFENDANTS,
ARON ROSENSWEIG AND ABE ROSEN-
SWEIG, TO THE PROCEEDINGS AND
THE JUDGMENT OF THE COURT
HEREIN

Be It Remembered, that on the 15th day of July, 1943, the plaintiff, United States of America, upon order of the Court, and acting by and through Charles H. Carr, United States Attorney, commenced this action in the District Court of the United States for the Southern District (Central Division) of California, by filing therein an information, being cause No. 16108 Criminal.

Count One of said information charges that defendants did knowingly and unlawfully offer for sale, sell and deliver certain beef to one E. E. Surhart for a price in excess of the maximum price fixed in Revised Maximum Price Regulation 169 (7 Fed Reg. 10381) as amended; Counts Two and Five of said information charge that defendants did knowingly and unlawfully fail and neglect to make and preserve complete and accurate records of sales of beef to purchasers [1*] thereof; and Counts Three, Four and Six of said information charge that defendants did knowingly and unlawfully give false invoices covering the sale of meat products to the purchasers thereof.

That thereafter and on the 26th day of July, 1943,

*Page numbering appearing at foot of page of original Bill of Exceptions.

the defendants and each of them was arraigned, and an order was made continuing the proceedings for plea until 9:30 o'clock A. M. on the 28th day of July, 1943.

That thereafter and on the 27th day of July, 1943, the defendant, Abe (Abraham) Rosensweig filed his separate plea in abatement and motion to quash the information herein, which plea and motion is in the words and figures following, to-wit:

(Title of Court and Cause omitted)

“Comes now Abraham Rosensweig, named in the information as Abe Rosensweig, and alleges: that he is not a partner in the firm of Central Packing Company, nor has he any interest in such firm, nor does he do business under the fictitious name of Central Packing Company.

Wherefore, he prays judgment on the information on file herein and that the information may be quashed.

Dated: July 27, 1943.

SAMUEL MIRMAN

Attorney for the defendant

Abraham Rosensweig.

State of California

County of Los Angeles—ss

Abraham Rosensweig, one of the defendants in the information filed in the above entitled action, makes oath and says that the foregoing plea is true in substance and matter of fact and that this defend-

ant has no interest in said Central Packing Company other than that of an ordinary employee.

ABRAHAM ROSENSWEIG

Subscribed and sworn to before me, a notary public, on the [2] 27th day of July, 1943.

SAMUEL MIRMAN

Notary Public in and for said
County and State."

That thereafter and on the 27th day of July, 1943, the defendants herein filed their joint demurrer to the information herein.

That thereafter and on the 28th day of July, 1943, the cause was ordered transferred to Judge Ben Harrison for further proceedings.

That thereafter and on the 28th day of July, 1943, the defendants filed their joint motion to quash the information herein and each and every count thereof, returnable on the 2nd day of August, 1943, which said motion is in the words and figures following, to wit:

(Title of Court and Cause omitted.)

"To Charles H. Carr, Esq., United States Attorney:

Please take notice that upon the information herein and upon all the previous process, pleadings, papers and proceedings had and taken therein an application will be made by the defendants, Aron Rosensweig and Abe Rosensweig, at a stated term of the United States District Court of the Southern District of California, Central Division, appointed to be held at the United States Court House, Temple and Main Streets, Los Angeles, California, at the

court room of the Honorable Ben Harrison, Judge presiding, on the 28th day of July, 1943, at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order quashing the information and each and every count thereof upon the grounds that:

1. That said information and each and every count thereof do not state facts sufficient to constitute an offense against the United States or the laws thereof.

2. That the affidavit supporting the information set [3] forth in counts 1, 2, 3, 4, 5 and 6 is not sufficiently definite so as to inform the defendants as to whether or not affiant was personally present at the time the alleged acts set out in said counts were committed.

3. That the counts setting forth the information, mainly counts 1, 2, 3, 4, 5 and 6, do not sufficiently state whether or not the sales were made by the defendants jointly, or by one of the defendants, or by one of the defendants acting as the agent of the other defendant or of both of them.

4. That the Emergency Price Control Act of 1942, upon which the information is based, is an improper use of the war power by Congress and is also an improper delegation by Congress of its legislative function to an administrative agency.

5. That the Emergency Price Control Act of 1942 and the Revised Maximum Price Regulation #169 and the Revised Maximum Price Regulation #148 deprive defendants of their rights under the fourth amendment and the fifth amendment to the Constitution of the United States of America.

That the defendants by reason of the matter set forth above pray that this information be quashed and that they be not called upon to plead further.

ARON ROSENSWEIG and

ABE ROSENSWEIG

By SAMUEL MIRMAN

Attorney for Defendants”

(Verification)

That thereafter and on the 2nd day of August, 1943, the Court overruled the separate plea in abatement of the defendant Abe Rosensweig, and likewise overruled the defendants’ joint motion to quash the information herein and likewise their joint demurrer to said information; to which rulings of the Court the defendants and each of them then and there duly excepted and their exceptions were duly noted and allowed by the Court. [4]

That thereafter and on said 2nd day of August, 1943, the defendants and each of them entered a plea of not guilty to each of the six Counts in the information, and the case was thereupon ordered set for trial by the Court at 10:00 o’clock A. M. on the 13th day of August, 1943.

That thereafter and on the 11th day of August, 1943, at 2:00 o’clock P.M., certain proceedings in this cause were had before the Honorable Ben Harrison, District Judge, in the words and figures following, to wit:

“The Court: The defendants desire to change their plea at this time?

Mr. Preston: If your Honor please, this case has

some peculiarities, and I have considered it carefully. It is a charge of violating price ceilings by a wholesale packer, and there are six counts. After a careful consideration of the case and consultation with the District Attorney, we are willing to enter pleas of guilty to two counts.

The Court: Which counts?

Mr. Preston: Well, they desire 1 and 3, and I don't believe it makes a whole lot of difference.

The Court: Is that satisfactory to the Government?

Mr. Kinnison: That is satisfactory, your Honor.

The Clerk: Mr. Aaron Rosensweig, do you desire to change your plea from not guilty to guilty on counts 1 and 3?

The Defendant Aaron Rosensweig: Yes, sir.

The Clerk: And Mr. Abe Rosensweig the same?

The Defendant Abraham Rosensweig: Yes sir.

Mr. Preston: Your Honor, I presume that this is a proper case for a report to the Court. These are very high class men, and I think the probation officer will find that that is true, and if it is desired by the Court we have no objection. [5]

The Court: I will refer it to the probation officer for a report by Monday, August 30th, at 10:00 o'clock. It is off calendar awaiting authority to dismiss as to the other counts."

That thereafter and on said 11th day of August, 1943, proceedings were had before the Court associating John W. Preston as counsel for the defendants herein.

That thereafter and on the 30th day of August,

1943, certain proceedings were had herein before the Honorable Ben Harrison, District Judge, in the words and figures following, to wit:

“Los Angeles, California,
Monday, August 30, 1943,
10:00 A.M.

The Clerk: United States vs. Aaron Rosensweig and Abe Rosensweig. Your name is Aaron Rosensweig?

Defendant Aaron Rosensweig: Yes, sir.

The Clerk: And your name is Abe Rosensweig?

Defendant Abe Rosensweig: Yes, sir.

Mr. Preston: Your Honor, may I make a few brief remarks in connection with this matter? I want to appeal to the mercy of the Court in this case, and I want to make a few statements of fact in connection with it.

I was in great doubt as to what to do about this case, and I thought it all over, and in view of the conditions surrounding the defendants, and of the war condition, and so on and so forth, I have decided to recommend that they plead to these two counts.

These are very small dealers—about 15 beef a week as against 250 or 1000 in other larger packing places. The act they committed, your Honor, was one, not of moral turpitude, but one of self preservation. They were put out of business on December 1, 1942, because they had no quota, and were kept out of

business until the 1st day of April, 1943, at [6] which time they were given a small quota, and they stayed in business until the 15th day of April, only about two weeks, when they were put out of business again, notwithstanding the great expense they had gone to in getting a crew together, and other expenses, and they continued until the 1st day of July. With no ceiling price on livestock, your Honor, they could not maintain themselves, or pay their expenses, and obey the ceiling price. The ceiling price was fixed at 13 cents for cattle, and when they had to pay 14 cents or 17 cents for cattle they could not live up to that regulation. Mr. Rosensweig, Sr. has been in business for twenty years, without a speck on his name. The young man is only an employee. I trust your Honor will be lenient with them, and I pledge you they will not disobey these rules any more.

The Court: What is the position of the Government?

Mr. Kinnison: The position of the Government is, I believe, more or less like in the report of the Probation Officer. The only matter is, I might somewhat question the size of the defendants' business, for the reason that the information on our file indicates a business greatly in excess of that mentioned by Judge Preston.

Mr. Preston: That is what I am told. Am I correct?

The Defendant: Yes.

Mr. Kinnison: There is evidence in the file of payments made by one of the defendants of \$7,000.00

bank deposit in one day. That would lead me to believe their business is somewhat larger than represented. I have no definite information.

Mr. Preston: What I referred to was beef, your Honor. There may be some other livestock which would make it greater.

Mr. Kinnison: I think we should have a true picture before the Court.

The Court: The offense to which they have pleaded is a deliberate, planned offense. It may be true that the regulations of [7] the OPA made it difficult for them to operate, but take the situation of the father; he came to this country, was naturalized, raised his family here, and prospered here. Those opportunities were furnished to him by our form of Government, and are the opportunities which are accorded to everyone. When it came down to the test, when this country is fighting for its life, not only on the battle front, but on the home front, these people who owe so much to this country, have violated our laws.

I have heretofore described this class of offense as secondary sabotage, and that is the way I feel about it now. I haven't any sympathy for these defendants, as I stated before, because their offense was deliberate, and it was motivated by the profit they desired to make at a time when our Government is striving to maintain price levels. I realize these price levels at times work a definite hardship on people, but this Court is not inclined to take these offenses lightly, and, unfortunately, people who violate these price ceilings are not deterred by fines.

It is the judgment of the Court in the case of Aaron Rosensweig, that he be fined in the sum of \$1,000.00, and committed to the county jail for 30 days.

It is the judgment of the Court in the case of Abe Rosensweig that he be fined in the sum of \$1,000.00 on Count 1. On Count 3 the sentence is suspended for a period of two years on the sole condition that during that period he shall not wilfully violate any of the provisions of the price regulations under the Price Administration, as now constituted, or any law that may be enacted to supersede it.

Mr. Preston: I don't understand.

The Court: The father is sentenced to 30 days in jail.

Mr. Preston: Do you suspend that?

The Court: No, I am not going to suspend it, because it has been my experience that fines do not stop these offenses.

Mr. Preston: May I make a statement to the Court? [8]

The Court: Yes.

Mr. Preston: I took this matter up with the United States Attorney's office, and they took it up with the Probation Officer. It was told to me that the limit set for the first offense in these cases was \$250.00, and, so far as these two defendants were concerned, \$125.00 on each count would be a sufficient fine. Upon that understanding with the United States Attorney and the Probation Officer, that is what I thought the judgment of the Court would be. I never would have thought of entering a plea of

guilty in a case of this character, where there would be a jail sentence.

Your Honor, I ask that you certainly suspend the sentence at this time, in this case, because I was truthfully taken by surprise by the attitude of the Court, because I understood, even in a second offense, they did not impose a sentence, except a suspended sentence.

Mr. Kinnison: I discussed this matter with Judge Preston. He asked me what sentence the Courts had been imposing. I advised Judge Preston that the only sentence that I had personal knowledge of was by Judge Beaumont, which had been imposed while I was in Court, and in that case a fine of \$250.00 was imposed. Judge Preston himself suggested the amount of a \$125.00 fine on each count, as to each defendant. There was no commitment made by myself, or anybody in the United States Attorney's office, as to any amount of fine or sentence of any kind that might be imposed in this case.

The Court: Just a minute. Judge Preston knows from his previous experience as United States Attorney that the United States Attorney cannot make any deal that will be binding upon the Court. This is a matter entirely up to the Court on a plea of guilty. That will be the judgment.

Mr. Preston: Mr. Kinnison will admit that he said \$125.00 was fair, and I went to the OPA office, and they thought it fair.

The Court: I don't care what the United States Attorney's office or the OPA thought. The defend-

ants are remanded to the custody [9] of the United States Marshal; that is, the father is so remanded. I am willing to give the young man a stay of five days to pay his fine.

Mr. Kimmison: I do not believe the Court stated the count on the sentence of Aaron Rosensweig.

The Court: On Count 1. On Count 3 the sentence will be suspended on the condition I stated, that there will be no willful violation.

That thereafter and on the 30th day of August, 1943, judgments of guilty were entered herein against the defendants, Aron Rosensweig and Abe Rosensweig and each of said defendants was fined One Thousand Dollars, and the defendant Aron Rosensweig was sentenced to thirty day in jail under Count One of the information; and as to each of said defendants sentence was suspended on Count Three for a period of two years and defendants were placed on probation for said period commencing at the expiration of sentence on Count One.

That thereafter and on said 30th day of August, 1943, an order was entered dismissing Counts Two, Four, Five and Six of the information as to each of the defendants herein.

That thereafter and on the 31st day of August, 1943, the defendants herein filed their joint motion for an order vacating the judgments, setting aside sentences, granting defendants the right to withdraw their pleas of guilty and to re-enter their pleas of not guilty, and for a new trial, which motion and the supporting affidavit of John W. Preston filed therewith are in words and figures following, to-wit:

(Title of Court and Cause omitted).

“TO THE PLAINTIFF ABOVE NAMED AND
TO THE HONORABLE CHARLES H.
CARR, UNITED STATES DISTRICT AT-
TORNEY, ATTORNEY FOR PLAINTIFF:

You and Each of You Will Please Take Notice that on Thursday, the 2nd day of September, 1943, at the hour of 10:00 o'clock A.M., of said day, or as soon thereafter as counsel can be heard, at the Court Room of the above entitled court, the Honorable Ben Harrison, [10] Judge Presiding, in the Federal Building at Los Angeles, California, the defendants above named will move said Court for an order vacating judgments, setting aside sentences, granting defendants the right to withdraw their pleas of guilty and to re-enter their pleas of not guilty, and for a new trial.

That said motion will be based upon the record, pleadings and files in said cause and particularly on the proceedings had therein on August 30, 1943, and upon the Affidavit of John W. Preston, a copy of which is served herewith.

That said motion will be made upon the ground that the record and affidavit show that the Court was without jurisdiction to impose judgment and sentence on these defendants at this time and that it is a proper case for the common law writ of coram nobis in that the defendants were induced to change their pleas of not guilty and enter their pleas of guilty upon assurances made to them by the office of the United States District Attorney at Los Ange-

les that small fines only would be imposed upon them and that such recommendations would be made to the Court by the probation officer thereof, and that such recommendations were not made and that defendants and each of them have a meritorious defense to said action.

Dated August 31, 1943.

JOHN W. PRESTON and

SAMUEL MIRMAN

By JOHN W. PRESTON

Attorneys for Defendants.”

“AFFIDAVIT IN SUPPORT OF MOTION FOR
ORDER VACATING JUDGMENT, GRANT-
ING DEFENDANTS THE RIGHT TO
WITHDRAW THEIR PLEAS OF GUILTY
AND TO RE-ENTER THEIR PLEAS OF
NOT GUILTY, AND FOR A NEW TRIAL.

State of California

County of Los Angeles—ss.

John W. Preston, being first duly sworn, deposes and says: That he became associate counsel for the defendants in the above [11] entitled action on or about the 2nd day of August, 1943; that previous to this time Samuel Mirman, Esq., had acted as the sole attorney for said defendants; that immediately following the employment of your affiant he began preparations to try the cause for the defendants, the cause being then set for trial for the 11th day of August, 1943.

That he investigated the proof in the cause, including a statement made by the chief complaining witness in said matter; that he ascertained that in his opinion the proof against the defendants was very weak and defective.

Affiant also investigated the law applicable to the case to a large extent and was of the view that the validity of the Emergency Price Control Act of 1942, as applied to these defendants, was very doubtful and likewise that the regulations invoked by said information were of doubtful validity.

However, notwithstanding the above opinion, your affiant counselled the defendants to the effect that in war time it would not be best to make an attack upon the law and the regulations if it could be avoided and that it was advisable to negotiate with the office of the District Attorney, looking toward a plea of guilty on some of the counts of the information and a dismissal of the remaining counts.

That acting upon this assumption, he contacted Assistant United States Attorney Ray H. Kinnison, in whom he had faith and confidence and who was handling the case for the office of the United States Attorney. Affiant was informed by Mr. Kinnison that he had already stated to affiant's associate, Samuel Mirman, Esq., that the Government would accept a plea of guilty on three of the counts of the information and would, if accepted by defendants, seek a dismissal of the remaining counts. Mr. Kinnison at the same time volunteered to state that in his opinion a plea to two counts would suffice if

agreeable to the legal staff of the Office of Price Administration in Los Angeles. [12]

Affiant made inquiry of Mr. Kinnison as to the nature of the judgments that had been imposed for offenses of this character and was informed that \$250.00 was the highest penalty that had been imposed and that no imprisonment sentences had been given by any Judge of the Federal Court. Mr. Kinnison recommended that affiant see the legal staff of the Office of Price Administration and said that anything they would recommend would be satisfactory to him as the representative of the Government.

That, accordingly, affiant called upon the Office of Price Administration and talked at length with Mr. Roger E. Johnson, who informed affiant that a plea of guilty on two counts would be satisfactory; that the plea should be upon count one and upon any other one of the remaining counts.

After talking with Mr. Johnson, your affiant then recontacted Mr. Kinnison and informed him of the statements made by Mr. Johnson. Affiant then asked Mr. Kinnison what he thought of a fine of \$125.00 on each count, making a total of \$500.00, with no imprisonment, if the defendants should enter pleas of guilty to the two counts. Mr. Kinnison responded that he thought that was just about the correct judgment that should be entered.

Affiant then asked Mr. Kinnison if he would recommend in open court such a disposition of the case. He responded that he did not feel free to mention figures to the Court and would not do so unless the

Court requested a recommendation from him, but he volunteered then and there to say that he could talk about the disposition of the cause and the amount of the fines to the probation officer and that the probation officer, in turn, was privileged to make, and would make, recommendations, including the amount of the fines, to the Court. He likewise promised to talk to the probation officer and ascertain from him if he would make a recommendation in the manner and amounts above set forth.

Affiant waited a day or two and again asked Mr. Kinnison if [13] he had talked to the probation officer about this recommendation. Mr. Kinnison replied that he had and that the probation officer said that he would make such recommendations to the Court with the sole proviso that the records of the defendants should be free from prior convictions.

Affiant, knowing that no prior convictions had been had, related these facts substantially as stated to defendants and upon this assurance they consented, upon affiant's recommendation, to withdraw their pleas of not guilty and to enter pleas of guilty to counts one and three of the information.

This change of plea took place on the 9th day of August, 1943. In open court at the time of the change of plea, affiant explained to the Court that he had taken the matter of settlement of this case up with the District Attorney and an agreement had been reached to plead guilty to counts one and three of the information and that the District Attorney was to recommend a dismissal of the remaining counts to

the office of the Attorney General at Washington, D. C.

Affiant queried Mr. Kinnison two or three times between the date of the change of plea and the date of judgment and was assured that he had heard nothing derogatory to the understanding concerning recommendations as to judgments in the case.

Finally, and on the morning of the day for judgment, to wit; August 30, 1943, affiant again queried Mr. Kinnison and was told by him again that everything was all right except that the report of the probation officer contained the word "substantial" with reference to the judgment. Affiant was not informed further about the matter, but believed that the word "substantial" was intended only to mean a substantial fine.

At the time of judgment on August 30, 1943, your affiant offered to explain fully the arrangement between the District Attorney's office in connection with this matter, but the Court declined to permit him to make such explanation and said that he was not [14] interested in it. Had your affiant been allowed to do so, he would have explained fully these facts and would have asked the Court to allow the defendants to withdraw their pleas of guilty and to re-enter their pleas of not guilty in the action. Affiant would not have recommended a change of plea had he not been assured that the recommendations described above would be made to the Court by the probation officer; that affiant feels that a great injustice will be done these defendants if this judg-

ment is not vacated and the defendants granted an opportunity to re-enter their pleas of not guilty and thereby granted a new trial herein.

That affiant verily believes that the defendants have a meritorious defense in that the Emergency Price Control Act of 1942 and the regulations thereunder may be held void by the Supreme Court of the United States. Likewise, affiant believes that the proof offered by the United States will be found insufficient to convict the defendants.

JOHN W. PRESTON

(Verification)

That thereafter and on the 1st day of September, 1943, the defendants and each of them filed an affidavit in support of their motion for an order vacating judgment, setting aside sentences, granting them right to withdraw pleas of guilty and re-enter pleas of not guilty and for a new trial. The affidavit of defendant, Aron Rosensweig, is in the words and figures following, to wit:

(Title of Court and Cause omitted)

“State of California

County of Los Angeles—ss.

Aron Rosensweig, being first duly sworn, deposes and says: That he is one of the defendants in the above entitled action; That on the 9th day of August, 1943, he entered his plea of not guilty to all counts in said information;

That at all times prior to August 2, 1943, Samuel Mirman, Esq. [15] acted as his sole attorney in said case; that on August 2, 1943, he associated John W.

Preston, Esq., as his counsel of record for the purpose of preparing his case for trial and trying said case.

That he had frequent conferences with John W. Preston, who investigated not only the evidence of the defense, but certain evidence of the prosecution and was informed by said John W. Preston that the evidence of the Government was weak and defective.

That John W. Preston also stated that there was grave doubt as to the validity of the law and of the regulations under it, set forth as the basis of the information in this case. But, said John W. Preston, notwithstanding the above, advised affiant that owing to the war conditions prevailing in the country, that it was best not to attack the validity of said law and regulations, but to secure permission to enter a plea of guilty on two or three of the counts of said information and pay a small fine thereon and have the case ended.

That he finally agreed that John W. Preston should negotiate with the office of the District Attorney in connection with such a settlement. That John W. Preston reported to him that the District Attorney had recommended to the probation officer and the probation officer would recommend to the Court that affiant be fined \$125.00 on two counts of said information and that no other punishment would be imposed.

That in changing his plea of not guilty to all counts to guilty on counts one and three, on the 9th day of August, 1943, he was influenced solely by the abiding belief and conviction that said recommendation of

said probation officer would be made as above set forth and that said judgment of said Court would be in accordance with such recommendation.

That had he not believed the above and foregoing to be correct, he would not have thought of pleading guilty to counts one and three, or to any other count or counts. That at all times men- [16] tioned herein this affiant has been informed by his counsel, after a fair statement of the facts to them, that good ground existed for the belief that the Supreme Court of the United States might declare said statute and said regulations under it invalid and void.

Affiant therefore asks the privilege of withdrawing his plea of guilty to counts one and three of said information and to that end the judgment in the case heretofore rendered be vacated and that he be allowed to re-enter his plea of not guilty to each count of said information and that he have a new trial thereon.

ARON ROSENSWEIG''

(Verification)

The affidavit of defendant, Abe Rosensweig, is in all material respects identical with the affidavit of defendant, Aron Rosensweig, in its factual statements, and is therefore not copied in Bill of Exceptions.

That thereafter and on the 2nd day of September, 1943, the affidavits of Roger Johnson and Ray H. Kinnison, in opposition to motion to vacate judgments, were filed herein and are in the words and figures following, to-wit:

(Title of Court and Cause omitted)

“AFFIDAVIT OF ROGER JOHNSON IN OP-
POSITION TO MOTION TO VACATE
JUDGMENT

United States of America

Southern District of California—ss.

Roger Johnson, being first duly sworn deposes and says:—

That affiant is an enforcement attorney in the Los Angeles District office of the Office of Price Administration; that as such attorney he represents the Office of Price Administration in criminal matters in the above-entitled court.

That on August 2, 1943 after defendants had entered pleas of “Not Guilty” the question of defendants changing their pleas to [17] “Guilty” was discussed by Samuel Mirman, Esq., defendants’ counsel, with Ray Kinnison, Assistant United States Attorney, and your affiant. Mr. Mirman indicated that, if agreeable to the United States Attorney’s office, defendants would be willing to plead guilty to two Counts of the information if the remaining Counts would be dismissed. Mr. Kinnison stated that such a plea would be acceptable to his office *(it if)* was acceptable to the O.P.A. Your affiant stated that it undoubtedly would be agreeable, but that affiant would want to check with his office before making a definite commitment. Mr. Mirman further stated that before he would permit his clients to change their pleas as indicated, he would want to obtain the approval of the attorney who he was going to associate with him in this

case. Mr. Mirman stated it would be necessary for him to associate counsel with him because he was going to be engaged for three weeks in the trial of a criminal case in the Superior Court of the State of California.

That on or about August 9, 1943, John W. Preston called at the Los Angeles District office of the O. P. A. at 1033 South Broadway, to keep an appointment he had made with affiant. He stated to affiant that he had discussed with Mr. Kinnison of the United States Attorney's office, the matter of defendants' pleading guilty to two Counts of the information and that Mr. Kinnison had stated that such a plea was acceptable if agreeable with the O. P. A. Mr. Preston wanted to know if our office would have any objection to such a plea. Your affiant stated that the Office of Price Administration had no objection and that affiant would so inform Mr. Kinnison. Your affiant did state that the O. P. A. would want the defendants to plead guilty to Count 1 of the information. Mr. Preston asked affiant if any defendants in these meat cases had been sentenced to jail, and affiant told him that none had been sent to jail, that one or two had been, besides being fined, placed on probation for two or three years.

About two days later Mr. Preston called affiant on the 'phone and [18] wanted affiant to assure him that the O. P. A. would not subsequently prosecute the defendants herein for any other violations of the meat regulations that had been committed by the defendants prior to the filing of the information herein. Affiant told him that, although the

Counts set forth in the information did not cover all the violations that our investigation had disclosed, our office would not subsequently prosecute the defendants for any other violations that they had committed prior to the filing of the information after they pleaded guilty to the information then on file.

ROGER JOHNSON”

(Verification)

“AFFIDAVIT OF RAY H. KINNISON IN OP-
POSITION TO MOTION TO VACATE
JUDGMENT

United States of America

Southern District of California—ss.

Ray H. Kinnison, being first duly sworn deposes and says:—

That affiant is an Assistant United States Attorney at Los Angeles, California. That on or about the 28th day of July, 1943, the above-entitled matter was assigned to affiant for disposition.

On August 2nd, 1943, demurrer and motion to quash filed by the defendants came on for hearing. At that time the court overruled said demurrer and motion, the defendants entered their plea of “Not Guilty” to all counts of the information, and the case was set for trial on August 13, 1943. Immediately thereafter the court recessed, and while still in the courtroom counsel for defendants, Mr. Samuel Mirman, Esq., approached your affiant and the question of the defendants entering a plea of

guilty was discussed. Mr. Roger Johnson, counsel for the Office of Price Administration was present in said court and took part in said discussion. It was then understood that the defendants would change their plea and enter a plea [19] of "Guilty" to two Counts of the information and that the United States Attorney would then move for dismissal of the remaining counts of the indictment. Mr. Mirman then stated that due to the fact that he would be engaged for approximately three weeks in the trial of a criminal case in the Superior Court of the State of California, it would be necessary for him to associate counsel to handle the above-entitled matter, and that before such steps were taken he desired that such counsel which should thereafter be associated in this matter should approve of this procedure.

Thereafter, on or about August 6th, 1943, affiant received a telephone call from John W. Preston who advised affiant that he had been associated as counsel for the defendants, and the question of the defendants changing their plea was briefly discussed. Thereafter, on or about the 7th day of August, 1943, Mr. Preston called at affiant's office and the following discussion took place:

Mr. Preston stated that at one time he had been United States Attorney at San Francisco, and for a number of years had been an Associate Justice of the California Supreme Court; that he questioned the validity of the Emergency Price Control Act and the Rules and Regulations passed thereunder, but that he believed that in time of war an

attack thereon should not be made (notwithstanding that the validity of said act and rules and regulations had already been made⁷ in this case by demurrer and motion to quash). After further discussion it was understood that the defendants would change their plea to "Guilty" upon two counts of the information and the balance of the counts would be dismissed after judgment had been imposed. The question of sentence was then discussed, and Mr. Preston asked what sentences had been imposed in similar cases. Your affiant stated that in the only case of which he had personal knowledge a fine of Two Hundred Fifty (\$250.00) Dollars had been imposed by Judge Beaumont, and that to the best of his knowledge no imprisonment sentences had been imposed by any Judge of the Federal Court in Los [20] Angeles. Mr. Preston then stated that before definitely deciding upon the procedure to follow he would like to talk to the officials of the Office of Price Administration. Your affiant advised Mr. Preston that he had no objection to this procedure.

Thereafter, on the morning of August 10, 1943, Mr. Preston again called at your affiant's office and stated that he had talked to Mr. Johnson at the Office of Price Administration, and had suggested to Mr. Johnson that a total fine of Five Hundred (\$500.00) Dollars would be proper in this case, and asked if your affiant would recommend such amount to the Court. Your affiant stated to Mr. Preston that it was the policy of the United States Attorney's office not to make any recommendation to the

Court as to the amount or nature of the sentence to be imposed and would not make any recommendation unless so requested by the Court. Mr. Preston then asked what recommendations the Probation Officer could or might make, and if that office would recommend a specific amount as to a fine. Your affiant advised Mr. Preston that it was the custom of that office not to recommend a specific amount as to a fine. Mr. Preston then requested your affiant to discuss the matter with the probation office and advise him thereof.

Thereafter, on the same day, your affiant talked to Mr. Meader, of the probation department, giving him the facts of the case and stating that Mr. Preston had suggested the amount of Five Hundred (\$500.00) Dollars as being a reasonable amount to fine the defendants. Mr. Meader stated that upon the facts stated, if the defendants had no prior record, "and all other things being equal," the probation office would undoubtedly recommend a "moderate fine." Thereafter, on the same day, your affiant called Mr. Preston on the telephone and repeated to him the statements made by Mr. Meador. Arrangements were then made to advance the case upon the calendar for defendants to change their plea.

On the morning of August 30, 1943, at approximately 9:30 A. M., [21] your affiant received a telephone call from Mr. Preston requesting information as to the report of the Probation Office. At that time your affiant read to Mr. Preston the last two

paragraphs of the report of the Probation Officer, which reads as follows:

“SUMMARY:

“Investigation has shown that Aron Rosensweig and Abe Rosensweig were violating price ceiling according to a well-planned scheme. Their invoices of maximum prices and checks received from buyers show similar amounts. However, they accepted further cash payment on the side. OPA investigation indicates that thousands of dollars over-charge was probably made by this method.

“RECOMMENDATION:

“Because of the clear past record of these defendants, penitentiary sentence is not recommended. It is recommended that they be given a heavy fine and placed on probation.”

No comment thereon was made by Mr. Preston.

Your affiant states that at no time did he make any statement to Mr. Preston or to anyone else to the effect that the Probation Officer would recommend the fine suggested by Mr. Preston. Affiant further stated to Mr. Preston that while the Probation Officer occasionally asks for suggestions from the United States Attorney's office as to a sentence to be recommended in a particular case, that office is in no way bound by such suggestion, and then reminded Mr. Preston that from his own experience as United States Attorney he knew the Court is

not bound to follow the recommendations of the Probation Officer.

Further affiant saith not.

RAY H. KINNISON."

(Verification) [22]

That thereafter and on said 2nd day of September, 1943, certain proceedings were had herein before the Honorable Ben Harrison, District Judge, in the words and figures following, to-wit:

(Title of Court and Cause omitted.)

"The Clerk: United States against Aaron Rosensweig and Abraham Rosensweig.

Mr. Preston: Ready.

Mr. Carr: The Government is ready, your Honor.

The Court: May I read the counter affidavit first, before you proceed?

Mr. Preston: Yes, your Honor.

May it please the Court, I have just perused, at the same time the Court was perusing it, the affidavit of Mr. Kinnison, and, if the Court will allow me, I would like to make just one or two contradictions to that, under oath. I would like to do so now, or file a counter affidavit later.

The Court: There will be no objection to that, I suppose?

Mr. Carr: The Government has no objection, your Honor.

Mr. Preston: May I be sworn now?

The Court: Yes.

JOHN W. PRESTON,

being first duly sworn, testified as follows:

The Court: May I suggest to counsel that he ought to take the witness stand?

Mr. Preston: Yes, your Honor.

The Court: You may make your statement in narrative form, rather than asking yourself the questions and giving the answers as far as the Court is concerned.

The Witness: Thank you. I have read the affidavit of Ray H. Kinnison, just filed in this Court, wherein an [23] extract is purportedly given of the Probation Officer's report in the pending case, with the statement that the report was read to me over the telephone. This statement is absolutely untrue. The only thing that was said between me and Mr. Kinnison upon that subject was that I asked him if there was anything in the report derogatory to our previous understanding that the Probation Officer would recommend to the Court a fine of not to exceed \$125.00 on each count, and he said the report was perfectly O. K. except for one word, that it had the word "substantial" in it, and there was no extract from that report read to me at all. Counsel is entirely mistaken about that, and that is corroborated by my statement, the fact that I said to the Court in chambers when I presented these papers, that the word "substantial" was quoted to me as being in the report by Mr. Kinnison. Isn't that true, Mr. Kinnison?

(Testimony of John W. Preston.)

The Court: No; you can't ask him. You are testifying now under oath.

The Witness: I am through.

Cross Examination

By Mr. Carr:

Q. Judge Preston, you did have a conversation at that time on the telephone with Mr. Kinnison?

A. Before going to Court on the morning of the 30th I asked him if the report was in accord with what I had understood to be its contents.

Q. You did at that time discuss the probation report?

A. Well, I asked him about the report, and he told me that the report was all right, except the one word——

The Court: Can't you answer the question?

A. Yes, I have answered it. What is the question again? [24]

Q. By Mr. Carr: Did you at that time discuss the probation report with Mr. Kennison?

A. To the extent mentioned only.

Q. Did he state what the probation report contained?

A. No, sir. He said that the word "substantial" was in the report, which was the only thing in it different from what our understanding was.

Q. Did you discuss or reiterate your understanding that the——

A. No, I didn't, but I did talk to him previously several times, two or three times, between the time

(Testimony of John W. Preston.)

of our understanding and the time the plea was entered and at the time in question now.

The Court: What was your understanding?

A. The understanding was as set forth in the affidavit, and I will repeat it, if you want me to.

Q. By Mr. Carr: Yes.

A. As soon as I was employed in this case, Mr. Carr, I looked into the law some; I looked into the proof some, I had the complaining witness queried, and I made up my mind that it was a very doubtful case.

Q. I mean, what was your understanding, if I may interrupt, with Mr. Kinnison?

A. That is what I am leading to. After talking the matter over and investigating it, I called on Mr. Kinnison, over the telephone, I think, first, and I don't remember the date—probably about the 5th or 6th of August—and he told me that he had made a proposition to Mr. Mirman, my associate here, whereby a plea of guilty to two counts might be entered, and the remaining counts dismissed, but on thinking it over he thought that would be satisfactory to him, but he didn't want to take that stand without the con- [25] sent of the legal staff of the OPA, and anything they agreed to would be all right. And I asked him what sentences had been meted out in similar cases, and he said the highest one he knew of was a fine levied by Judge Beaumont of \$250.00. I then, acting on his offer, went to see Mr. Johnson, of the OPA staff, and talked at length with him about it, and he told me

(Testimony of John W. Preston.)

that a plea on two counts would be satisfactory to him. And I told him I was going to report that to Mr. Kinnison. And I asked him which counts, and he said No. 1 and I asked him which after that, and he said any other one, that it didn't make any difference to them. I then relayed this information to Mr. Kinniston, and asked him what he thought of \$125.00 as the maximum fine on each count, and he said, "That is, in my opinion, just right."

Q. He did state to you that it was his opinion?

A. He did, yes, in his judgment, it was just right. And I then asked him if he would make such a recommendation to the Court, and he said, "You know Judge Harrison. You can't make recommendations in his Court, and I can't do it unless he asks me." I said to him, "It is sometimes done, even in Judge Harrison's Court", and he said, "I can do this", he says, "I can talk to the Probation Officer, and," he says, "he can talk to the Judge and make recommendations." I said, "Well, you can talk with the Probation Officer and see if he will make this recommendation", and he said he would. And he either called me or I called him, and I asked him what the Probation Officer said, and he said the Probation Officer was agreeable to it, and he would do it unless, on investigation, he found that there was a previous conviction against the defendants. And I told him I didn't fear that at all. And that was the understanding.

The Court: That was what the substance of the conver- [26] sation was?

(Testimony of John W. Preston.)

A. Yes; that is what the understanding was.

Q. By Mr. Carr: Then there was no understanding other than what you have related as between you and Mr. Kinnison?

A. No. I think that is all. He simply reported back that it was all right with the Probation Officer. Then I contacted Mr. Kinnison two or three times after that, to see if there was any change of attitude of the Probation Officer, and he said no, until the morning of the trial, and that is when he said that the word "substantial" was in the report. I never saw this report, nor do I remember any reading of the report.

Q. Mr. Kinnison didn't tell you that he would see to it that the Probation Officer would make a specific recommendation to the court, did he.

A. That is the way I understood it, absolutely. He said he would talk to the Probation Officer, and he reported back to me that the Probation Officer would make the recommendation. That is absolutely correct.

The Court: You made the statement that your recollection of this matter is that the report was not read to you?

A. I know it wasn't read to me.

Q. By Mr. Carr: Could you be mistaken, that you thought he was talking, but that he was actually reading from the report?

A. There was no reading at all, nothing read whatever. He told me the report was all right, meaning, as I took it, that it was according to our

(Testimony of John W. Preston.)

understanding, except that the word "substantial" was there.

Q. Now, Judge, with those facts in mind, you advised your clients, did you not, to plead guilty in this case? [27]

A. I did. I consulted with them, and I said, "You have got a 50-50 chance to beat this case, but," I said, "the OPA has put the law under attack, but I think they will straighten this out, and I don't believe we will make a fight on the law or regulations". And I said, "I have talked it over with the United States Attorney's office and the Probation Officer has agreed to recommend a fine of not to exceed \$125.00 on each count, and I recommend that you change your plea on that ground."

Q. Didn't you just say that Mr. Kinnison said he could not recommend the fine?

A. He said just what I said, exactly.

The Court: You also advised your clients that sentence would be imposed, and that that was a matter that was up to the Court?

A. I told them that the Court would not have to live up to it, but I knew then, as I know now, that the defendants would have the right to change their pleas, if this was not lived up to. I had been through that, and I knew that.

Mr. Carr: May I have that last answer read, Mr. Reporter?

(Last answer read by the Reporter.)

The Witness: Of course, I couldn't bind the Court and wouldn't try to bind the Court.

(Testimony of John W. Preston.)

The Court: What I am getting at, Judge, is that you reported your discussion with the United States Attorney's office and made the recommendation, and you most certainly advised your clients that you couldn't guarantee any such result?

A. No, I couldn't guarantee the result.

The Court: I mean, you didn't so advise them?

[28]

A. I did not. I told them I thought the recommendation of the Probation Officer would be accepted, in all likelihood, in toto, but that, of course, nothing could be guaranteed about that.

The Court: Didn't you advise your clients, Judge, that any proposed arrangement with the United States Attorney would be subject to the will of the Court and the conscience of the Court?

A. I think that was understood, so that there was no use commenting on that subject. There is a liason between the United States Attorney and the Federal Court, and the Defendants have a right to rely on assurances made by the United States Attorney's office.

Q. Mr. Carr: You did so advise your clients, however, that it would be subject to the conscience of the Court?

A. Well, that may have been, in substance, what I told them, that I thought the law hadn't been passed on, and it was doubtful whether it was valid or not, and that no Court would impose any imprisonment sentences under conditions like that. in my opinion, especially when a man couldn't pos-

(Testimony of John W. Preston.)

sibly live up to those regulations and continue in business.

Q. Just one other fact for the record. You were a former Supreme Court Justice of the State of California? A. Yes, sir.

Q. And you were formerly United States Attorney, during war time, during the last war?

A. Yes, I was. I handled this same kind of cases then.

Q. And you have been practicing law for how many years?

A. I was regularly admitted April 6, 1897. [29]

Q. And at the present time you are still in good health?

A. I am still in good health, and I am friendly to the Courts, and friendly to you and the whole office. I just don't want to be put in an awkward position here and have these men suffer due to what I said in their behalf, in representing them.

Q. Did you advise your client to state in his affidavit that he was innocent?

A. He didn't state that he hadn't made an infraction of the regulations. It is there only that he has a good defense, and I think he has got it myself.

Mr. Carr: That is all, sir.

Mr. Preston: Now, may it please the Court, I move your Honor, with the greatest respect for the institution your Honor presides over, for an order vacating these judgments entered on the 30th day of August, 1943, and permitting these defendants to

withdraw their pleas of guilty to Counts 1 and 3, and re-enter their pleas of not guilty to each and every count of the information, and that they be given what would be, in effect, a new trial. I base that motion, if your Honor, please, upon two grounds:

1. Because it is a motion in term time, which the Court can entertain; and

2. On the second ground that it is a motion that serves the purpose of the common law writ of *coram nobis*.

The substance of these affidavits and counter affidavits has been read, undoubtedly, and reviewed again here this morning, and it is not necessary for me to further relate what the facts of this case are. I want to state your Honor that I have been sworn here this morning, and I [30] have had a great deal of experience with the Federal Courts, and I have wielded the strong arm of the Government for years. And I have had many seemingly bitter experiences in Court, but I have never had one that wasn't ironed out properly, and which didn't increase my respect for the Courts—and, I hope, their respect for me—and my respect for the institutions of our country.

This case is one in which the United States Attorney should be willing to consent to the withdrawal of the pleas or a modification of the judgment of the Court in this matter. There is surrounding the United States Attorney's office and its relation to the Court a sacredness that should not be even open to suspicion or question at any time.

It is far better that a guilty man escape than that disrespect or criticism or suspicion run against the Court and its functions.

Now, Mr. Kinnison and I thought that this Probation Officer would recommend this fine of \$125.00, and that that recommendation would be substantially respected by the Court. I told the defendants that, and they relied on it. Their affidavits are not contradicted, that they relied on that solely, solely on my advice, and I did it for the purpose already explained to your Honor, that is, largely to prevent an attack upon the OPA law and regulations in this critical time. And I don't believe now that it would be fair or just to these defendants, who have splendid reputations, who are gentlemen of high standing in their community, to imprison them on a first offense, which occurred recently, back in April or May of this year, where ~~there~~ hadn't been an adjudication of the validity of the Act or the validity of the regulation.

This very regulation was before the Supreme Court of the United States on the 10th day of May, in the case of Lockerty [31] vs. Phillips, an exactly parallel case, except that this was a big institution. They were meat dealers. They bought meat from the packers and sold it to the retail trade, and they asked for an injunction against the OPA on the ground that they could not live up to this regulation and stay in business. And they made the very point that we would make now, if this were a case before the Court now, that the Administrator had failed to fix or regulate the price of livestock.

“The conditions in the industry—including the quantity of meat available to packers for distribution to wholesalers, the packers’ expectation of profit, and the effect of these conditions upon the prices of meat sold by packers to wholesalers—are such that appellants are and will be unable to obtain a supply of meat from packers which they can resell to retail dealers within the prices fixed by Regulation No. 169.”

The Court denied this injunction upon the ground that equity jurisdiction had been put in the Emergency Court, but confined its statement as to equitable remedies, which were the remedies sought here, to-wit, an injunction against the enforcement of the regulation, to the following, in the concluding part of this opinion:

“Since appellants seek only an injunction which the District Court is without authority to give, their bill of complaint was rightly dismissed. We have no occasion to determine now whether, or to what extent, appellants may challenge the constitutionality of the Act or the Regulation in courts other than the Emergency Court, either by way of a defense to a criminal prosecution or in a civil suit brought for some other purpose than to restrain enforcement of the Act or Regulation issued [32] under it.”

The Court reserved that power, which we would raise here, so I thought, and I think I had the

right to think, that no Court in this doubtful state of the law, against a first offender, would assess a prison sentence. I never even thought the Court would do it. I was willing, of course, on the matter of the fine, that the Court's judgment not be questioned too much, but I thought \$125.00 was enough. It amounted to \$250.00 for each defendant. And they are of the same family. They are small operators. On the matter of whether they were doing it for profit, they were doing it to live. They couldn't have maintained their organization or their customers or their business if they had lived up to this Regulation. And here is what a member of this very OPA had to say on this very subject. I am reading from the Saturday Evening Post. He said:

“Only an economist could expect the meat industry sells steaks at prices based on thirteen-cent livestock when the live animal costs fifteen cents or more, and be surprised to find that such a policy resulted in a nation-wide black market. Only economists would insistently keep such a policy in force when the results were so obvious and so tragic.”

I went through the prohibition period, your Honor, and you cannot enforce a law, in my opinion, unless there is public sentiment behind it, with force in it. And public sentiment was not supporting this Regulation. This very man resigns from the office and comes out and writes an article for the Saturday Evening Post, to show why the OPA had failed. The nation-wide existence of black

markets is, of course, known inferentially, if not actually, to all of us. [33]

The law in this case is clear that it is within the Court's power to do this during term time, or because of the writ of coram nobis. The law is clear.

I wrote the opinion in *People vs. Schwarz* in 201 Cal., which has been reaffirmed in two or three cases since that time. My very language is quoted in it, and in that opinion I state for the Court that you had better let a guilty person go than to have the District Attorney's office put in such a position that people would be afraid to deal openly and honestly and fairly with them, for fear of what might happen thereafter.

The Court: The facts in that case were entirely different than they are in this.

Mr. Preston: They were somewhat different, your Honor.

The Court: That was a case where a party had been misled into making a statement, on the promise that he would be granted immunity.

Mr. Preston: Or else not be fined more than \$250.00.

The Court: In this case I was rather interested in your language:

"The case of *People vs. Miller*, 114 Cal., 10, 16, it is said, supports the action of the trial court, but it is not in the same category with the case before us as to the facts thereof. There the defendant was led by the advice of his counsel to believe that he would get less punishment if he changed his plea to guilty than he would receive

if he stood trial and was convicted. In this hope, however, he was disappointed. The Court rightly held that with full knowledge of the consequences which might follow he should not be permitted to speculate upon the action of the Court. But even in that case the Court said: 'The law seeks no unfair advantage over a defendant, but is watchful to see [34] that the proceedings under which his life or liberty is at stake shall be fairly and impartially conducted. It holds in contemplation his natural distress, and is considered in viewing the motives which may influence him to take one or another course. Therefore it will permit a plea of guilty to be withdrawn if it fairly appears that defendant was in ignorance of his rights and of the consequences of his act, or was duly or improperly influenced either by hope or fear in the making of it.'

Mr. Preston: The case of *People vs. Campos*, 3 Cal. 2d., Page 15, is a case where the District Attorney told the defendant that he thought that if he would plead guilty he would get a life sentence instead of a sentence of death, and the Court gave him a sentence of death.

In the case of *People vs. Savin*, which is a very much weaker case than this one, the District Attorney told the defendant he thought he would be sent to the road gang, and the Deputy District Attorney told him the same thing, and told him he thought it would be for about nine months, and the Court didn't send him to the road gang. And the Court let him change his plea and plead not guilty.

The Court: What is that citation?

Mr. Preston: That is the case of *People vs. Savin*, 37 Cal. App., Page 105.

I don't know what else to say, if your Honor please. I never was more shocked in my life than at this occurrence, as I have suggested here, and I have been at the bar and a trial lawyer since 1897. I have tried to maintain my respect for the Courts and their respect for me. And I am at an awful disadvantage to see these men sent to jail under these circumstances, your Honor, and I wouldn't have thought of it. They had better stand trial and be convicted than [35] to do this. And with the law in the uncertain state it is in, I wouldn't have thought of tendering a plea of guilty in their behalf, under these circumstances, your Honor.

I just say that your Honor should not permit this judgment to stand under these circumstances. Under the writ of *coram nobis* you can modify the judgment, so that the rights of these defendants will be respected, as well as having the law vindicated.

I ask your Honor for the most careful consideration of the motion.

The Court: What is the position of the United States Attorney?

Mr. Carr: If the Court please, where there is a question of doubt I would suggest, in the interest of justice, that a defendant be given even a second opportunity. But, first, may I preface my remarks by saying, your Honor, that in my opinion the Court has no power to set this judgment aside un-

less, on the theory of the writ which Judge Preston has mentioned, it has the power to——

The Court: Well, let us not argue about the law, because I am going to pass upon it in a factual manner. I am going to assume that if the Court has been imposed on and I have been a party to an unfair situation, I will try to correct it.

Mr. Carr: I would want your Honor to correct it within the Court's sound discretion, but I think there are limitations with respect to the writ.

The Court: I can always modify the judgment, and, after all, that is what Judge Preston really wants.

Mr. Carr: That is exactly what he wants, and that is the whole trouble. They got 30 days, and, having chiseled on the OPA, now the two defendants want to chisel on the [36] sentence. Judge Preston has not stated in his affidavit nor in his testimony any different understanding from what possibly many lawyers get every day in their career, and that is that the United States Attorney or the District Attorney, as the case may be, says, "We will accept a plea on two counts, and the Court in these cases is doing such and such", and that is only a statement of opinion, and if Mr. Kinnison said that he would recommend probation, that statement may have been inadvisedly made. We do not recommend to the Probation Officers. We do consult with them at times. And the Court is not bound by the judgment of a Probation Officer. So counsel comes into court and testifies and shows that he went to his client and advised him to plead guilty, and under the circumstances as he related them

on the witness stand the client came into court and was asked if he was guilty, and he pleaded guilty, and he got a sentence that he didn't like. The only thing I have in mind is that I don't want to set up, if I can help it, a procedure whereby defendants take pleas, and then, when they don't get what they think they ought to have, they come in and ask the Court to set aside the judgment. I am going to submit that there is upon the United States Attorney a strict and solemn duty to see that justice is done. If this Court, in its sound discretion, feels that anything has obtained in this procedure which has brought about injustice to these defendants, I would be the first to ask to set ~~aside~~ it aside, and we will give them a trial, you may rest assured. But if the Court feels, from the statements in the affidavit and from the testimony given, that this is nothing more than an effort on the part of these defendants to chisel down their sentences, then I earnestly suggest that the Court deny the motion. [37]

I have been with the Government some several years myself, and I abhor any Government man who will take advantage of a defendant under any circumstances, and I have tried to adhere to that rule. Perhaps sometimes there are misunderstandings between lawyers, but Judge Preston, who has served all of these years as counsel and as United States Attorney also—there are three of us in this courtroom who have served as United States Attorney—knows that when he represents a client the duty is bounden upon him to advise that client that when he pleads guilty, no man can bind the

Court, and that the Court will do as it pleases. So it behooved Judge Preston, and from his testimony I glean that he did, to advise his clients of that possibility, and, knowing those facts full well, he came into this Court and pleaded guilty, and now he stands here and says, "I have been mistreated."

I submit the matter to your Honor. I must uphold the men in my office. Mr. Kinnison is a new man in this office, but I have absolute confidence in him. I don't believe for a moment that he intended to do or say anything that was not exactly true. But I respectfully say that, as between these two gentlemen, one is mistaken; which I do not know.

The Court: Where is there any serious conflict in their statements, except as to the report of the Probation Officer?

Mr. Carr: There is no conflict, except in that one statement, and I will say this to the Court, that perhaps even Judge Preston could be mistaken. We are willing to submit it to the sound discretion of this Court, and if the Court feels that there is the slightest indication that we have misled the defendants, we are perfectly satisfied to have the Court do as it sees fit. [38]

Mr. Preston. I want to resent the statement that we are here trying to chisel down this judgment because we are surprised by it. That is not true. My attitude has been throughout this case to respect the OPA, the legal staff of the OPA, and the Court, and to prevent this case from going to trial under the circumstances stated, because I thought

the law was so uncertain and the attitude of the Court was such that this was the best way out of it, because I couldn't conscientiously have them testify that they did not do some of the things they are accused of, and I simply told them to do what I thought was the best for everybody, including the OPA and everybody else, in connection with the matter. And I had every hope, and every right to expect, that the Probation Officer would make a recommendation to your Honor that there be a fine according to the understanding had with the United States Attorney's representative, and that he reported that he had referred it to the OPA, and that the Probation Officer had agreed to it. Now, as I said before, if the Court will modify the judgment on this plea so that it will come in the neighborhood of what we felt it would be at the time of the plea, and, if not, we will be happy to try the case.

Your Honor, as I said before, I feel terribly here about it. I want to respect the Courts; I want to respect the United States Attorney's office; and I want to respect the Price Administration Office; and I want to do my duty by my clients and I want to do my duty by my country. I have put this matter up to the Court in the way I have, just as it occurred, and I had no thought that there would be anything but a fine in the neighborhood of \$125.00, and, as I said before, I sincerely hope that, in order to vindicate their rights, that they may be allowed to do that. [39]

Mr. Carr: I failed to state, your Honor, our

position with respect to that proposition. I do take a definite stand. If they have pleaded guilty under circumstances where they didn't understand that there would not be any compromise offers, the whole thing should be set aside, and we should be allowed to proceed in the regular course at the trial, and not make a fire sale out of this proposition.

Mr. Preston: I don't like chiseling and fire sales, your Honor.

The Court: When you presented this matter you said you had to file your notice of appeal by tomorrow?

Mr. Preston: Yes, your Honor.

The Court: Is it your understanding that the submission of this motion holds the matter in abeyance?

Mr. Preston: I don't know whether it does or not.

The Court: The reason I asked is so that I will know whether it is essential that the matter be decided at this time.

Mr. Preston: The filing of notice of appeal might oust the Court of jurisdiction.

The Court: That would be a happy solution for the Court.

Mr. Preston: I think the Court should act, if possible, in the matter.

The Court: I can act. I feel that there is no serious conflict in the affidavits except as to the report of the Probation Officer. And it is true, according to Judge Preston's statement, that he was

advised, before the Court pronounced judgment, that the Probation Officer had recommended a substantial fine. So, in effect, the two statements are not in serious conflict in that regard.

Judge Preston places the Court in a rather peculiar [40] position, because of our many years of friendship. I first got acquainted with him when he was touring the state as a candidate for Associate Justice of the Supreme Court, and I met him at a bar meeting in San Bernardino, and he comes here this morning and makes a plea for himself, rather than for the defendants in the case. If it was a personal matter, there would be no question as to what I would do. If it was simply a question of this Court's favoring one party over another, I certainly would like to accommodate Judge Preston. ?

I think I should make this statement, that the Court has felt that the imposition of fines for carrying on a black market is about as effective as fines were in enforcing prohibition. I realize that nothing stopped the violation of the Prohibition Act, either jail or fines. But the Court's attention has been called to the fact that people have been fined for violation of the price ceilings and have gone out of court and even bragged about the fact that they got off easy, that it was profitable to violate the law. Just a short time ago I imposed what I thought was a heavy fine upon a defendant, and he couldn't withhold his mirth and happiness over the fine imposed until he got out of the courtroom; it was right in front of me. So I had come to the conclusion, of my own volition, that there is only one

way to put a little sting in this, and that is to either fine them such an amount that it will really hurt, or to include a jail sentence along with the fine. The report of the Probation Officer indicated that these men, and particularly the father, if a heavy fine had been imposed, such as was in contemplation of Congress, would put them out of business; that each of them was subject to a fine of \$10,000.00 and each was subject to a sentence of one year on each count. The report of the Probation Officer indicated that the father could stand what the [41] Court felt was a substantial fine without hurting him financially and perhaps seriously interfering with his future operations in business. So I decided in my own mind that I would give a fine that was 10 per cent of the maximum provided by Congress and give a jail sentence, not only as punishment to this party, but that it might deter others that might be so inclined. The fact is that I sentenced three other men to jail on the same day for a violation of the OPA regulations, giving all of them much heavier sentences than I gave the father in this case. I gave two men ninety days and one six months.

I am sorry that Judge Preston appeals to the Court as a personal matter of his own relationship with his clients, and any intimation that the Court is singling out his clients for punishment is absolutely untrue. As far as making a recommendation is concerned, the Probation Officer did make a recommendation. The only break in the whole proceeding is that the Court exercised its own independent judgment. That seems to have been the

trouble in this case. I don't know whether I should do that or not, or whether I should let counsel and the United States Attorney bind the Court in its enforcement of the law.

Mr. Preston: It is a question of what the defendants had a right to think, your Honor.

The Court: It isn't a question of what they had a right to think. They were advised, according to your testimony, that it was a matter that would rest entirely within the discretion of the Court, and you advised them in advance of your discussion with the United States Attorney's office as to what precedents had been established, that, according to other judgments, their fines would not exceed \$500.00. Really, if it wasn't for the fear that one man's [42] liberty is at stake, it would almost be beyond comprehension that a man of Judge Preston's ability and experience and standing would be misled or his clients would be misled.

Mr. Preston: I have seen this very Court accept the recommendation of the United States Attorney.

The Court: I did accept his recommendation in an antitrust case, where, after many months of negotiations, and the Court not knowing anything about the general scheme of things, the Court did accept the Government's recommendations as to the fines that were to be imposed.

Mr. Preston: I have seen hundreds of instances myself by the Judges.

The Court: I followed his recommendation. But there was no recommendation made to me in this case, and you were not advised that any recom-

mentation by the United States Attorney would be made to me in this case.

Mr. Preston: No, but I thought the Probation Officer would make a recommendation to you, not the United States Attorney.

The Court: The only thing is that the Courts and Probation Officers, and even the United States Attorneys, don't agree. You undoubtedly have had the experience that when the Probation Officer recommended leniency you haven't been willing to follow his recommendation. I know that was true when I was United States Attorney. I have recommended probation, and the Courts have refused to follow my recommendation.

Mr. Preston: I think this Act contemplates that the Probation Officer shall make recommendations.

The Court: It does not contemplate that the Court is bound by his recommendations.

Mr. Preston: No. But you have a right to feel that they are selected men, and that you have a right to rely upon assurances they make.

The Court: Are you going to rest on that, that you have a right to rely on the Court following their recommendations?

Mr. Preston: The defendants have a right to rely upon an Officer of the Court doing what he promises to do in the way of a recommendation. [43] to the Court, and he didn't recommend a \$125.00 fine.

The Court: And your affidavits in this case do not indicate that Mr. Kinnison agreed to recommend that.

Mr. Preston: Mr. Kinnison told me that he couldn't make the recommendation, but that he could speak to the Probation Officer and he would do it. I waited until he did that and reported back that it was O.K., and then, on that assurance, I told the defendants, and they agreed to do it. They didn't want to do it.

The Court: Then on the morning of the plea you were advised that the Probation report had the word "substantial" in it.

Mr. Preston: He said the word "substantial" was in there, yes, your Honor.

The Court: What is the difference between "substantial" and "heavy"? We are not going to argue about that. There is another thing in this case, and that is that this case was set down for trial and would have been tried before this, but two days before trial they came in here before the Court and withdrew their pleas of not guilty and entered new pleas of guilty.

Mr. Preston: And I told you at that time, your Honor, that we had made an arrangement with the United States Attorney.

The Court: As to the dismissal of three counts.

Mr. Preston: Yes, and the fact that we were negotiating, your Honor.

The Court: I certainly wouldn't protest against your negotiating with the United States Attorney, because that is a common practice. You had six counts against you, and you got four of them dismissed. The only unfortunate part in this case from your viewpoint is that the Court had con-

cluded that it was going to put a little sting in the violations of these OPA Rules and Regulations. I am also aware of the fact that the packing industry has had its difficulties. I am also aware of the fact that the public generally is very much interested in putting a stop to the black market and in maintaining price levels. I am going to take the matter under submission. I want to think it over, but I will decide it sometime today." [44]

That thereafter and on said 2nd day of September, 1943, an order was entered herein denying defendants' motion to vacate judgments, for leave to withdraw pleas of guilty and to re-enter defendants' pleas of not guilty, to set aside the sentences imposed, and for a new trial, to which action of the Court the defendants excepted and their exceptions were allowed by the Court.

That thereafter and on said 2nd day of September, 1943, an order was entered allowing defendants five days additional stay of execution of the judgments rendered herein.

That thereafter and on said 2nd day of September, 1943, the defendant Aron Rosensweig filed Notice of Appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit, which notice and the grounds of appeal are in the words and figures following, to wit:

(Title of Court and Cause omitted.)

"Name and Address of Appellant's Attorneys:

John W. Preston and Samuel Mirman, 712 Rowan

Building, 458 South Spring Street, Los Angeles, California.

Offense: Violation of Emergency Price Control Act of 1942, 56 Stat. 23, January 30, 1942. Count One: Did knowingly, wilfully and unlawfully offer for sale, sell and deliver to E. E. Surhart, one side of beef for sum \$88.91, which side of beef had a maximum price of \$68.18; etc., and Count Three: Did knowingly, wilfully and unlawfully give a false invoice No. 9373, to E. E. Surhart, etc., as more fully set forth in the said two counts of the Information.

Date of Judgment: August 30, 1943.

Brief Description of Judgment or Sentence:

That defendant is guilty of the offense as charged in Counts One and Three of the Information and Counts 2, 4, 5 and 6 dismissed; that defendant be imprisoned for thirty (30) days in a jail and pay a fine unto the United States of America in the sum of One Thousand (\$1000.00) Dollars on Count One; and it is further ordered that the [45] imposition of sentence on Count Three is suspended for the period of two (2) years and defendant is placed on probation for said period of two years commencing at the expiration of the sentence on Count One on the condition that the defendant shall not wilfully violate any of the price regulations or any law made to supercede them.

Name of Prison Where Now Confined If Not on Bail:

Remanded and now held by United States Marshal

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

I elect not to enter upon the service of sentence pending appeal.

Dated: September 2, 1943.

ARON ROSENSWEIG

Appellant

GROUND OF APPEAL:

1. That the Information and each count thereof fail to charge a public offense against the laws of the United States of America.

2. That the trial court should have sustained appellant's demurrer to the Information and to each count thereof.

3. That the Information and each count thereof fail to state facts sufficient to constitute a public offense against the laws of the United States of America.

4. That the trial court should have granted appellant's motion to quash the Information.

5. That the Emergency Price Control Act of 1942 (56 Stats. 23, January 30, 1942) and particularly Sections 2 and 201, are void as an attempted delegation of legislative power to an Administrator in violation of Article One, Section One of the Constitution of the United States of America.

6. That the Emergency Price Control Act of 1942 and particularly Section 2 thereof, in delegat-

ing power to the Price Administrator to [46] establish and maintain maximum prices for commodities, violates Article One, Section One, of the Constitution of the United States of America and is void in that it fails to prescribe adequate standards to guide the Administrator in the exercise of the power granted.

7. The Emergency Price Control Act, as applied to appellant, denies him due process of law in derogation of the Fifth Amendment to the Constitution of the United States of America, and is therefore unconstitutional and void.

8. That Maximum Price Regulation 169, promulgated by the Price Administrator, fixing maximum wholesale prices for beef, is violative of the Fifth Amendment to the Constitution of the United States and void in that the Administrator, in fixing such prices, failed to give due consideration to the various factors affecting cost of production and distribution of meat in the industry as a whole.

9. That the Emergency Price Control Act of 1942 denies appellant the due process of law guaranteed him by the Fifth Amendment to the Constitution of the United States in that by Secs. 203 and 204(d) of said Act, the forum in which appellant is prosecuted for a violation of said Act and the Maximum Price Regulation promulgated pursuant thereto, is precluded from questioning the validity of said Act and Regulation.

10. That the Emergency Price Control Act of 1942, and particularly sections 2 and 3 thereof, are as to appellant void in that arbitrary, unreasonable

and discriminatory classifications of commodities and prices are created in violation of the Fifth Amendment to the Constitution of the United States.

11. That Maximum Price Regulation 169, for a violation of which appellant was convicted, deprives appellant of due process of the Fifth Amendment to the Constitution of the United States in that said Regulation unlawfully classifies appellant as a wholesaler of a commodity processed from an agricultural commodity. [47]

12. That the failure of the Price Administrator to fix or regulate the price of livestock prior to promulgating Maximum Price Regulation 169, for a violation of which appellant was convicted, rendered said Regulation invalid because in violation of the Fifth Amendment to the Constitution of the United States.

13. That the trial court was without jurisdiction to enter said judgment and sentence as to Appellant because of the promises made to the Appellant by the Assistant United States District Attorney that the Probation Officer, if Appellant would plead guilty to two counts, would recommend to the Judge of said Court that a fine of not to exceed One Hundred Twenty-five (\$125.00) Dollars on each Count of the Information so plead to by Appellant, would be imposed.

14. That the trial court erred and committed an abuse of discretion in refusing to vacate the judgment and sentence as to Appellant, grant him a new trial, and permit him to withdraw his plea of guilty

and enter a plea of not guilty to each Count of the Information.”

That thereafter and on said 2nd day of September, 1943, the defendant Abe Rosensweig filed Notice of Appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit, which notice and the grounds of appeal are in the words and figures the same as stated in the Notice of Appeal of the defendant Aron Rosensweig, and therefore are not stated in detail in this Bill of Exceptions.

That thereafter and on the 7th day of September, 1943, an order admitting defendants to bail and staying execution of the fines imposed upon them was filed herein, and each of the defendants deposited into the registry of the District Court the sum of One Thousand Dollars (\$1000.00) to guarantee the payment of the fine imposed upon him.

That thereafter and on the 8th day of September, 1943, each of the defendants herein filed a cash bail bond for the sum of Two Hundred and Fifty Dollars (\$250.00) and paid said sum into the registry of the District Court. [48]

That thereafter and on the 16th day of September, 1943, a stipulation for the consolidation of the respective appeals of the defendants Aron Rosensweig and Abe Rosensweig from the judgments entered against them was filed, and said stipulation is in the words and figures following, to wit:

(Title of Court and Cause omitted.)

“It Is Hereby Stipulated by and between plaintiff and the appealing defendants, Aron Rosensweig and Abe Rosensweig, in the above entitled action, that

the appeal of the respective filing defendants from the Judgments, and each of them, of the above entitled Court, made and entered in the above entitled cause against them, and each of them, on August 30, 1943, may be presented to the United States Circuit Court of Appeals, in and for the Ninth Circuit, as one appeal, and may be presented on one record, and prepared, presented and considered as the joint record of the filing defendants, including one assignment of errors and one bill of exceptions.

Dated: September 16th, 1943.

CHARLES H. CARR,

United States Attorney

By (Signed) CHARLES H. CARR

Ass't. United States Attorney
for Plaintiff

JOHN W. PRESTON &

SAMUEL MIRMAN

By (Signed) JOHN W. PRESTON

Attorneys for defendants"

That thereafter and on said 16th day of September, 1943, an order was entered allowing the defendants herein to consolidate their respective appeals and to present the same on one record, which order is in the words and figures following, to wit:

(Title of Court and Cause omitted.)

"It appearing that the plaintiff and appealing defendants in the above entitled action have stipulated that the appealing [49] defendants may present their appeal on one record, and the necessity therefor appearing to this Court;

It Is Hereby Ordered that the defendants, Aron Rosensweig and Abe Rosensweig, may consolidate and present their respective appeals as one appeal, and that said appeals may be presented on one record and prepared, presented and considered as the joint record of the filing defendants, including one assignment of errors and one bill of exceptions.

Dated: September 16, 1943.

(Signed) PAUL J. McCORMICK
Judge''

The foregoing contains a full, true and correct copy of all proceedings had and of all the testimony introduced and received in evidence in this cause at the hearing thereof.

Wherefore, the defendants present the foregoing as their proposed Bill of Exceptions in this cause, and pray that the same be settled and allowed.

Dated this 28th day of October, 1943.

JOHN W. PRESTON and
SAMUEL MIRMAN

By JOHN W. PRESTON
Attorneys for Defendants

(Title of Court and Cause omitted.)

It Is Hereby Agreed that the foregoing proposed Bill of Exceptions is full, true and correct, and we stipulate that the same may be settled and allowed by the Court and filed herein as the engrossed Bill of Exceptions.

Dated this 1st day of November, 1943.

CHARLES H. CARR

United States Attorney

RAY H. KINNISON

Assistant United States Attorney

Attorneys for Plaintiff

JOHN W. PRESTON and

SAMUEL MIRMAN

By JOHN W. PRESTON

Attorneys for Defendants.

[50]

The foregoing Bill of Exceptions, as stipulated to by attorneys for plaintiff and defendants, is a full, true and correct Bill of Exceptions and embraces and contains all of the evidence adduced at the trial of the above entitled cause and all statements of Counsel and acts and rulings of the Court occurring at the trial of said cause and the proceedings taken thereafter; and said Bill of Exceptions is hereby ratified and approved by the undersigned Judge of this Court, who presided at the trial of this cause, as a full, true and correct Bill of Exceptions duly and regularly presented and settled within the time allowed by law and as extended by the Court and within the term in which the judgment was rendered as extended by law and the orders of this Court. Such part of the testimony as is given in the form of questions and answers is deemed to be necessary to be put in that form for a full and complete understanding thereof.

Dated this 2 day of Nov, 1943.

BEN HARRISON

Judge of the District Court of
the United States for the
Southern District of Cali-
fornia (Central Division).

[Endorsed]: Filed Nov. 2, 1943. [51]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR IN BEHALF OF
DEFENDANTS ARON ROSENSWEIG AND
ABE ROSENSWEIG

1. The District Court erred in overruling defend-
ants' demurrer to the information heerin, because
said information and each and every count thereof
fails to state facts sufficient to constitute a public
offense against the laws of the United States.

2. The District Court erred in overruling defend-
ants' demurrer to the information herein, because
the Emergency Price Control Act of 1942 (C. 26,
56 Stat. 23, 50 U.S.C.A. App. Section 901, et seq)
as amended by the Inflation Control Act of October
2, 1942 (C. 578, 56 Stat. . . . , 50 U.S.C.A. App. Sec-
tion 961, et seq) is unconstitutional and invalid in
that said Act as amended purports to improperly
delegate the legislative power to the Price Adminis-
trator in violation of Article I, Section 1, of the
Constitution of the United States.

3. The District Court erred in overruling defend-

ants' demurrer herein, because the Emergency Price Control Act of 1942 (C. 26, 56 Stat. 23, 50 U.S.C.A. App. Section 901, et seq.) as amended by the Inflation Control Act of October 2, 1942 (C. 578, 56 Stat. . . . , 50 U.S.C.A. App. Section 961, et seq.) is unconstitutional and invalid because said Act as amended is in conflict with the Fifth Amendment to the Constitution of the United States in that the classifications attempted to be made in said Act are unjust, unreasonable and arbitrary and deprive appellants of their liberty and property without due process of law and of their private property without just compensation.

4. The District Court erred in overruling defendants' demurrer herein, because the Emergency Price Control Act of 1942 (C. 26, 56 Stat. 23, 50 U.S.C.A. App. Section 901, et seq.) as amended by the Inflation Control Act of October 2, 1942 (C. 578, 56 Stat. . . . , 50 U.S.C.A. App. Section 961, et seq.) and Revised Maximum Price Regulations Nos. 169 (7 Fed. Reg. No. 10381) and 148 (7 Fed. Reg. No. 8609), as amended, issued thereunder by the Price Administrator are unconstitutional and invalid because in conflict with the Fourth and Fifth Amendments to the Constitution of the United States, and deprive defendants of their liberty and property without due process of law and of their private property without just compensation.

5. The District Court erred in refusing to adjudge that Revised Maximum Price Regulation No. 169 (7 Fed. Reg. No. 10381), as amended, effective April 3, 1943, promulgated by the Price Adminis-

trator and establishing wholesale prices for meat, is in violation of the Fifth Amendment to the Constitution of the United States, because said Regulation does not give due or any adequate consideration to the various factors entering into the production, processing and distribution of meat by defendants and others similarly situated, or by the meat industry as a whole thereby depriving defendants of their liberty and property without due process of law.

6. The District Court erred in overruling defendants' demurrer and in refusing to adjudge that Section 204(d) of the Emergency Price Control Act of 1942, as amended, is unconstitutional and invalid in that it deprives defendants of their right, by way of defense to the information filed against them herein to attack the constitutionality and validity of the Revised Maximum Price Regulations promulgated by the Price Administrator, in violation of the Fifth Amendment to the Constitution of the United States.

7. The District Court erred in refusing to adjudge that Revised Maximum Price Regulation No. 169 (7 Fed. Reg. No. 10381), as amended, promulgated by the Price Administrator, is invalid because: (a) It wrongfully fails to establish maximum prices for livestock as an agricultural commodity, (b) wrongfully classifies appellants as wholesalers of a commodity processed from such livestock, as an agricultural commodity, and (c) said Regulation wrongfully fails to allow appellants a fair and reasonable, or any, profit on the processed

commodity, thereby depriving them of their property in violation of the Fifth Amendment to the Constitution of the United States.

8. The District Court erred in denying appellants' motion for an order to vacate the judgments rendered herein, to set aside the sentences imposed thereunder, to grant appellants leave to withdraw their respective pleas of guilty and re-enter their former pleas of not guilty, and for a new trial.

9. The District Court erred and was guilty of an abuse of discretion in refusing to vacate the judgments rendered herein and to allow appellants to withdraw their respective pleas of guilty and re-enter their former pleas of not guilty to the information and to each and every count thereof, and in refusing appellants a new trial, thereby depriving them of their liberty and property contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

10. The District Court erred in refusing to consider, and in disregarding the negotiations and agreements between appellants and the United States Attorneys whereby appellants were induced to withdraw their respective pleas of not guilty and enter pleas of guilty upon the representations of the United States Attorneys that nominal fines only, without further punishment, would be satisfactory to the Government.

Wherefore, and by reason of said errors and other manifest errors appearing in the record here, the defendants pray that the judgments of conviction

be set aside and that they be discharged from custody.

Respectfully submitted,

JOHN W. PRESTON and

SAMUEL MIRMAN

By JOHN W. PRESTON

Attorneys for Defendants.

I hereby acknowledge receipt of a copy of the within Assignment of Errors, etc., this 2nd day of November, 1943.

CHARLES W. CARR,

United States District Attorney

By RAY H. KINNISON

Asst. U. S. Atty.

[Endorsed]: Filed Nov. 2, 1943.

[Endorsed]: No. 10540. United States Circuit Court of Appeals for the Ninth Circuit. Aron Rosensweig and Abe Rosensweig, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed November 15, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10540

ARON ROSENSWEIG and
ABE ROSWENSWEIG,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANTS INTEND TO RELY UNDER
RULE 19 (C.C.A. 9TH CIRCUIT).

Notice is hereby given that appellants Aron Rosensweig and Abe Rosensweig adopt as their points on appeal the assignments of error appearing in the transcript of the record herein; and that appellants desire that the transcript of the record, bill of exceptions, and assignments of error, as certified, be printed in their entirety.

Dated this 17th day of November, 1943.

ARON ROSENSWEIG and
ABE ROSENSWEIG

Appellants

JOHN W. PRESTON and
SAMUEL MIRMAN

By JOHN W. PRESTON

Attorneys for Appellants

Receipt of a copy of the within Statement of Points Upon Which Appellants Intend to Rely Under Rule 19 (C.C.A. 9th Circuit) is hereby acknowledged this 18 day of November, 1943.

CHARLES H. CARR,

United States Attorney

By RAY H. KINNISON,

Asst. U. S. Atty HKM

[Endorsed]: Filed Nov. 19, 1943. Paul P. O'Brien, Clerk.

No. 10,540

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARON ROSENSWEIG and ABE ROSENSWEIG,
Appellants,

VS.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANTS.

ARON ROSENSWEIG and
ABE ROSENSWEIG,
Appellants.

JOHN W. PRESTON, and
SAMUEL MIRMAN,
By JOHN W. PRESTON,
Rowan Building, Los Angeles, California,
Attorneys for Appellants.

FILED

JAN 4 - 1944

PAUL P. O'BRIEN,
CLERK

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No. 10,540

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARON ROSENSWEIG and ABE ROSENSWEIG,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS.

STATEMENT.

The information (R. pp. 3-14) charges the defendants with six violations of Revised Maximum Price Regulations Nos. 169 and 148, as amended, and the Emergency Price Control Act of 1942, as amended. The defendants filed a motion to quash the information (R. pp. 54-56) which was denied (R. p. 56), and a demurrer (R. pp. 11-13) which was overruled (R. p. 56), to which action the defendants excepted and their exceptions were allowed and noted (R. p. 56). Thereupon, on August 2, 1943, defendants pleaded not guilty to all charges in the information (R. pp. 14-15, 56). Thereafter, on August 11, 1943, pursuant to an understanding and arrangement with the United States attorney (R. pp. 61-62, 65-75, 81-88), defendants changed their pleas of not guilty and pleaded

guilty to Counts One and Three of the information (R. pp. 15-16, 56-58); and Counts Two, Four, Five and Six of the information were ordered dismissed (R. pp. 18-20). The understanding and arrangement was that defendants plead guilty to Counts One and Three of the information and be fined \$125.00 each on each of said Counts, and that all other Counts of the information be dismissed (R. pp. 61-62, 65-75, 81-88). Thereafter, on August 30, 1943, the Court entered judgment that defendant Aron Rosensweig be fined the sum of \$1,000.00 and be committed to jail for thirty days (R. pp. 17-19) and that defendant Abe Rosensweig be fined \$1,000.00 on Count One and that imposition of sentence on Count Two be suspended for two years (R. pp. 19-20). On August 31, 1943, defendants filed a motion to vacate said judgments and suspend said sentences, for leave to withdraw pleas of guilty and reenter pleas of not guilty, and for a new trial (R. pp. 64-65) and affidavits in support thereof (R. pp. 65-72) which motion was denied (R. pp. 21-22). Thereafter, on September 3, 1943, each defendant filed Notice of Appeal (R. pp. 24-26, 28-31) and by stipulation (R. pp. 45-46) the appeals were ordered consolidated (R. pp. 46-47).

SPECIFICATION OF ERRORS.

Defendants have assigned errors (R. pp. 115-119) and rely upon each and all thereof. Fundamentally, the errors assigned present three principal questions for consideration:

1. Revised Maximum Price Regulations Nos. 169 (7 Fed. Reg. No. 10381) and 148 (7 Fed. Reg. No. 8609) as amended, promulgated by the Administrator of the Office of Price Administration (OPA), upon which all Counts of the information are based, are unconstitutional and invalid because: (a) said Regulations, at all times mentioned in the information, had not been and were not approved by the Administrator of Food Production and Distribution (commonly known as and called Food Administrator) as required by law, and hence said Regulations were not in effect or binding upon the defendants; and (b) said Regulations are unconstitutional and invalid, in that they deprive defendants of their liberty and property in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

2. The Emergency Price Control Act of 1942 is unconstitutional in that it illegally delegates legislative powers to the Administrator in violation of Article I, section 1 of the Constitution, and in that it sets no standard sufficiently definite to guide the Administrator in the exercise of the delegated powers.

3. The District Court erred and abused its discretion in refusing to vacate the judgments and sentences and permit defendants to withdraw their pleas of guilty and reenter their pleas of not guilty, and in refusing a new trial.

The jurisdiction of this Court is invoked under Section 128 of the Judicial Code as amended (28 U.S.C.A., Sec. 225(f)) and Rule 3 of the Rules of Criminal Procedure (18 U.S.C.A. Poll. Sec. 688) promulgated by the Supreme Court under authority of 47 Stat. 904, as amended (18 U.S.C.A.

ARGUMENT.**INTRODUCTORY STATEMENT.**

The six counts of the information charge defendants with six violations of the Emergency Price Control Act of 1942 (Ch. 26, 56 Stat. 23, 50 U.S.C.A. App. Section 901, et seq.), as amended, and Revised Maximum Price Regulations Nos. 169 (7 Fed. Reg. No. 10381) and 148 (7 Fed. Reg. No. 8609). Counts Two, Four, Five and Six were dismissed by the Court (R. pp. 18-20). Only Counts One and Three are involved in this appeal.

Count One charges defendants with selling one side of grade A beef weighing 296 pounds to one E. E. Surhart for \$88.91 in violation of Revised Maximum Price Regulation No. 169 fixing the price thereof at \$68.18 and in violation of the Emergency Price Control Act of 1942.

Count Three charges defendants with issuing to one E. S. Surhart an invoice for meats sold to him at the price of \$164.71, but that, in fact, defendants charged and received therefor \$189.46, in violation of Revised Maximum Price Regulations Nos. 169 and 148, and that the giving of such invoice is in violation of the Emergency Price Control Act of 1942.

Since Counts One and Three charge the offense of violating the legislative order of an executive officer, it is necessary to determine whether such official had lawful authority to make such order, and whether the order is in compliance with all of the requirements of the legislative act purporting to confer such authority. Defendants challenge the validity of Regulations

Nos. 169 and 148 upon the several grounds specified in their assignments of error (R. pp. 115-119), and assert that said Regulations were not in legal effect at the several times mentioned in the information, and that, therefore, defendants were not bound by said Regulations.

I.

REVISED MAXIMUM PRICE REGULATIONS Nos. 169 AND 148, AS AMENDED, ARE UNCONSTITUTIONAL AND INVALID.

It is manifest that the validity of any maximum price regulation promulgated by the Administrator of the Office of Price Administration (commonly known as Price Administrator) must depend upon the provisions of the Emergency Price Control Act, and other Acts of Congress, which, it is claimed, confer upon him authority to issue such regulations. If a citizen is to be punished for a violation of a regulation issued by the Price Administrator, then such regulation must come within the authority conferred by a constitutional statute. If such authority is not conferred, or if the provisions of the statute purporting to confer it have not been followed, then the regulation is invalid.

In *Panama Refining Co. v. Ryan*, 293 U.S. 388, 432, 433, 79 L. Ed. 446, 465, the Supreme Court said:

“If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order

is within the authority of the officer, board or commission * * *."

To like effect are: *United States v. Eaton*, 144 U.S. 677, 36 L. Ed. 591; *United States v. 11,150 Pounds of Butter*, 195 Fed. 657 (8 Cir.); *St. Louis etc. Bridge Ry. Co. v. United States*, 188 Fed. 191 (8 Cir.).

In an article entitled, "Validity of Federal Departmental Regulations Involving Criminal Responsibility", 35 Harv. L. Rev. 952, the question under discussion is treated as follows:

"Assuming that the defendant has violated a departmental regulation, for which the government seeks to hold him criminally responsible, the court must determine whether the regulation is beyond the powers conferred upon the department by Congress. Since the purpose of the exercise by the executive of regulatory functions is to enable Congress more effectively to express its will, the rule-making power cannot be exercised beyond the limits designated by Congress."

A. Regulations Nos. 169 and 148 never became effective.

Section 2 of the Emergency Price Control Act of 1942 (C. 26, 56 Stat. 23; 50 U.S.C.A. App. Section 902), subject to certain reservations applying to agricultural commodities and products processed therefrom, purports to authorize the Price Administrator to fix maximum prices of various commodities, including meats.

Section 3(c) of the Act (Sec. 903(c) of 50 U.S.C.A. App.) qualifies the authority of the Price Adminis-

trator, as to commodities processed or manufactured from any agricultural commodity, as follows:

“No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a).”

It cannot be doubted that a side of beef, and other meat products, such as are mentioned and described in the information, are processed from an agricultural commodity, that is, livestock. This is made clear by Section 3 of the Inflation Control Act of 1942 (Section 963 of 50 U.S.C.A. App.) which provides, *inter alia*:

“That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, *including livestock*, a generally fair and equitable margin shall be allowed for such processing” (italics ours),

the Congress thus making certain that livestock shall be classified as an agricultural commodity.

In this connection, the authority of the Administrator to regulate the prices of agricultural commodities, and of products processed from such commodities, was limited narrowly to such regulations as should be approved by the Secretary of Agriculture. Section 3(e) of the Act (Section 903(e) 50 U.S.C.A. App.) provides:

“Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity *without the prior approval of the Secretary of Agriculture * * *.*” (Italics ours.)

The authority, power and duties of the Secretary of Agriculture, conferred upon him by Section 3(e) of the Act (Sec. 903(e) 50 U.S.C.A. App.), supra, were, by Executive Order No. 9328, dated April 8, 1943, transferred to the Administrator of Food Production and Distribution, commonly called Food Administrator. (See 50 U.S.C.A. App., page 314).

Examination of Regulations Nos. 169 (7 Fed. Reg. No. 10381) and 148 (7 Fed. Reg. No. 8609) shows that the same were never approved by the Secretary of Agriculture, or by the Food Administrator, as required by law, at any of the times mentioned in the information. In the absence of such approval, Regulations Nos. 169 and 148, as amended, never became effective and valid. Hence, an information based thereon, as here, does not charge an offense against the laws of the United States. Therefore, defendants' motion to quash and demurrer should have been sustained.

B. Regulations Nos. 169 and 148 are unconstitutional and invalid.

Regulations 169 and 148, as amended, are also unconstitutional and invalid. These regulations are legislative orders issued by an executive official, and their constitutionality depends (a) upon whether

Congress could and did lawfully delegate its legislative powers to an administrative official, and (b) if constitutionally delegated, whether such official has complied with constitutional requirements in the exercise of such powers.

Defendants assert, first, that Congress did not delegate its powers to the Price Administrator *alone* to regulate prices of meats and meat products, and, second, that the Administrator's Regulations 169 and 148, which were not approved by the Secretary of Agriculture or the Food Administrator, are accordingly unconstitutional and invalid. Defendants further assert that said Regulations are unconstitutional and invalid because they deprive defendants of their liberty and property without due process of law. Further discussion of this proposition follows in Section II hereof.

II.

THE EMERGENCY PRICE CONTROL ACT OF 1942 IS UNCONSTITUTIONAL IN THAT IT ILLEGALLY DELEGATES LEGISLATIVE POWERS TO THE PRICE ADMINISTRATOR IN VIOLATION OF ARTICLE I, SECTION 1, OF THE CONSTITUTION.

It is fundamental that Congress may not delegate purely legislative functions to the executive department of the Government. Many cases so hold. (*Field v. Clark*, 143 U.S. 649, 36 L. Ed. 294; *J. W. Hampton, Jr. v. United States*, 276 U.S. 394, 72 L. Ed. 624; *Panama Refining Co. v. Ryan*, 293 U.S. 388, 79 L. Ed.

that Congress cannot delegate to an administrative officer, board or commission its power to create and define crimes and offenses against the United States. (*United States v. Eaton*, 144 U.S. 677, 36 L. Ed. 591; *Donnelley v. United States*, 276 U.S. 512, 72 L. Ed. 678; *Interstate Commerce Commission v. Brimson*, 155 U.S. 4, 39 L. Ed. 49; *United States v. Maid*, 116 Fed. 650; *United States v. Grimaud*, 220 U.S. 506, 55 L. Ed. 563; *United States v. 11,150 Pounds of Butter*, 195 Fed. 663; *Todd v. United States*, 158 U.S. 282, 39 L. Ed. 982).

This principle is summarized in *Panama Refining Co. v. Ryan*, 293 U.S. 38, 421, 79 L. Ed. 446, 459, as follows:

“The Constitution provides that ‘All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.’ Art. I, Sec. 1. And the Congress is empowered ‘To make all laws which shall be necessary and proper for carrying into execution’ its general powers. Art. I, Sec. 8, par. 18. The Congress manifestly is not permitted to abdicate, *or to transfer to others*, the essential legislative functions with which it is thus vested”. (Italics ours.)

* * * * *

“Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that Section 9(c) of the National Industrial Recovery Act) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, *has*

established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited." (Italics ours.)

"* * * the Executive Orders * * * and the Regulations issued by the Secretary of the Interior thereunder, are without constitutional authority."

In *Schechter Corp v. United States*, 295 U. S. 495, 79 L. Ed. 1570, also involving the N.I.R.A., the Supreme Court said, at p. 541 (L. Ed. p. 1586):

"To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. *Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them.* For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, connection and expansion described in section 1. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, *the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the Code-making authority thus conferred is an unconstitutional delegation of legislative power.*" (Italics ours.)

The delegation of legislative power condemned in the *Panama* and *Schechter Cases*, supra, was not one whit more offensive to the constitutional provision, supra, than that involved in the case at bar.

Section 1(a) of the Emergency Price Control Act (Sec. 901(a) of 50 U.S.C.A. App.) merely declares the general objects and purposes of the Act. Section 2(a) of the Act (Sec. 902(a) of 50 U.S.C.A. App.) provides:

“Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following:

Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. * * * Before issuing any regulation or order * * * the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. * * * Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection."

Section 2(c) (Section 902(c) of 50 U.S.C.A. App.) provides:

"Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may

provide for a maximum price or a maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.”

These provisions of the Act do not prescribe rules for the fixing of maximum prices of meats and like commodities or for the government of any given industry. Instead, the Act merely authorizes the making of codes or regulations by the Price Administrator to prescribe them. For this legislative undertaking the Act sets up no standards aside from the general statement of the general aims of stabilizing prices and preventing abnormal increases thereof. By the foregoing provisions of this Act the necessity or policy of fixing maximum prices of any commodity, including meat, is left solely to the judgment of the Administrator, and whether the prices so fixed are fair and equitable is likewise left to his sole judgment. Even the specified consultations with committees representing industry—obviously advisory only—may “in his judgment” be followed or entirely disregarded. The provisions of the Act that “the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 * * *”,—which is closest to fixing a standard for his conduct—is in fact nullified by the qualifying phrases “so far as practicable” and “as in his judgment will be generally fair and equitable”, and the later phrase “without regard to the foregoing provisions of this subsection (may), issue temporary regu-

lations or orders''. Everything pertaining to the government of industry, the fixing of prices, et cetera, is left to the judgment and discretion of the Administrator, as expressed in codes or regulations promulgated by him. His judgment and discretion are virtually unfettered by any provisions of the Act. This constitutes a delegation of legislative power fully as broad as that which was condemned by the Supreme Court in the *Panama Refining Company* and *Schechter Corp. Cases*, supra, and is equally offensive to and violative of Article I, Section 1 of the Constitution. This delegation also includes the power to create and define crimes and offenses against the United States.

The offenses charged in Counts One and Three of the information are not created or defined by the Act. The offenses charged in these Counts are created and defined by the legislative orders and Regulations of the Administrator. Examination of the Act and Regulations so shows.

The only provisions of the Act which relate to creating or defining a criminal offense are found in Section 4(a) thereof (Section 904(a) of 50 U.S.C.A. App.) as follows:

“It shall be unlawful * * * for any person to sell or deliver any commodity * * * or otherwise to do or omit to do any act, *in violation of any regulation or order under section 2, * * *.*”
(Italics ours.)

The “violation” thus made unlawful is not the violation of any provision of the Act itself, but, instead,

is the violation of "any regulation or order (which may be issued by the Administrator) under section 2 of the Act". Thus, in essence, the Administrator is given the power to create and define criminal offenses against the United States. And, the exercise of this power by the Administrator is not safeguarded or hedged about by any standard or rule fixed by the Act, but is left to his unfettered discretion. This is delegation run riot, and, if countenanced, may well result in government by the ukase of an administrative official, instead of government by law as contemplated by the Constitution. Such delegation of legislative power cannot constitutionally be made. (*United States v. Eaton*, 144 U.S. 677, 36 L. Ed. 591; *Donnelly v. United States*, 276 U.S. 512, 72 L. Ed. 678; *Panama Refining Company v. Ryan*, *supra*; *Schechter Corp. v. United States*, *supra*, and other cases cited, *supra*).

III.

THE DISTRICT COURT ERRED AND ABUSED ITS DISCRETION IN REFUSING TO VACATE THE JUDGMENTS AND SENTENCES AND PERMIT DEFENDANTS TO WITHDRAW THEIR PLEAS OF GUILTY AND RE-ENTER THEIR PLEAS OF NOT GUILTY, AND IN REFUSING A NEW TRIAL.

After defendants pleaded not guilty to all Counts of the information (R. pp. 14-16, 56) their attorneys entered upon negotiations with attorneys for appellee and the OPA, "looking toward a plea of guilty on some of the Counts of the information and a dismissal of the remaining counts" (R. p. 66). Subsequently, after several conferences at which the matter,

including amount of fines, was discussed, defendants were informed by said attorneys that a fine of \$125 on each of two Counts against each defendant would be satisfactory to the Government and OPA (R. pp. 66-68, 74, 75, 78); but the Assistant United States Attorney stated, "he did not feel free to mention figures to the Court", but, "he could talk disposition of the cause and the amount of the fines to the Probation Officer," who, "in turn was privileged to make, and would make, recommendations, including the amount of the fines to the Court" (R. p. 68). Some days later the Assistant United States Attorney informed defendants' attorneys that he had talked with the Probation Officer, who "said he would make such recommendations to the Court with the sole proviso that the records of the defendants should be free from prior convictions" (R. pp. 68, 78). "Upon this assurance they consented * * * to withdraw their pleas of not guilty to Counts 1 and 3 of the information" (R. p. 68). Shortly before the hearing on August 30, 1943, defendants' attorneys were advised by the Assistant United States Attorney that "everything was all right except that the report of the Probation Officer contained the word 'substantial' with reference to the judgment, which they believed was intended only to mean a substantial fine" (R. p. 69). Attorneys for appellee and the OPA substantially admit the facts thus stated (R. pp. 73, 74, 77, 78). Defendants' attorney, John W. Preston, offered to explain this arrangement to the Court at the hearing "but the

Court declined to permit him to make such explanation and said he was not interested in it. * * * Affiant would not have recommended a change of plea had he not been assured that the recommendations described above would be made to the Court by the Probation Officer” (Aff. John W. Preston, R. p. 69).

Upon this showing the District Court should have permitted defendants to withdraw pleas of guilty and reenter their pleas of not guilty, and refusal to do so constituted error and abuse of discretion under the authorities.

Rule 2(4) “Criminal Procedure after plea of guilty, verdict of finding of guilt” (18 U.S.C.A. App. following Sec. 688) provides:

“A motion to withdraw a plea of guilty shall be made within ten (10) days after entry of such plea and before sentence is imposed.”

Rule 2(2), *id.*, provides:

“* * * motions in arrest of judgment, or for a new trial, shall be made within three days after verdict or finding of guilt.”

Defendants’ motions were made within the times fixed by Rule 2(4) and 2(2), *supra*, but after sentence. Inasmuch as sentence was summarily imposed in announced disregard of an existing agreement, we assert that no opportunity was afforded, prior to sentence, to withdraw plea, and hence defendants’ motion should have been granted. This contention is supported by both reason and authority.

In *Robinson v. Johnston*, 118 F. (2d) 998 (9 Cir.), this Court held that "a motion to vacate judgment and to withdraw plea of guilty on grounds that defendant was insane, under duress and misrepresentation when he pleaded guilty * * * and that Court erred in imposing sentence less than ten days after the plea, went to the jurisdiction of the trial court" (Syl. 2), and said, page 1000:

"We hold that where the motion to the trial court is based upon facts that properly would have been brought to the court's attention at common law by the writ of error coram nobis, such motion may be made after the expiration of the time fixed for such motions by Rule II, supra."

The motion here in question is analogous to the motion made in the *Robinson Case*, supra, and should have been granted. See, also, *Johnson v. Zerbst*, 304 U.S. 458, 82 L. Ed. 1461; *Frame v. Hudspeth*, 309 U.S. 662, 84 L. Ed. 898; *Deutsch v. Aderhold*, 30 F. (2d) 677; *People v. Schwarz*, 201 Cal. 309; *Clemons v. United States*, 137 F. (2d) 302 (Adv. Op.); *Paris v. United States*, 137 F. (2d) 302 (Adv. Op.).

In *Clemons v. United States*, 137 F. (2d) 302 (4 Cir.) supra, the Court held that "where assistant United States district attorney gave defendant his assurance that he would be prosecuted under misdemeanor provisions of criminal statute, and thereafter sentence was imposed * * * under felony provisions of the statute, defendant was deprived of liberty in violation of 'due process of law' Clause of Federal Constitution" (Syl. 5). Defendant had pleaded not

guilty to the entire indictment. In this connection the Court said, pages 305, 306:

“We cannot clearly and surely assume what course of conduct would have been adopted by Clemons and his counsel had they not relied on the statement of the Assistant District Attorney. Perhaps, without this assurance and with a possible felony charge and punishment therefor before him, Clemons might have been willing to plead guilty to a misdemeanor charge, and this might have been accepted by the court. Perhaps, without this assurance, Clemons and his counsel might have used much greater diligence in preparation for trial and might have employed equally different tactics during the course of the trial itself. We cannot be sure just what would have been the course of events.

It may well be that Clemons and his counsel acted a bit precipitately in accepting this assurance at its face value and in proceeding accordingly. It does not follow that they, therefore, acted altogether unreasonably. Certainly the whole procedure smacks of surprise, which should if possible be avoided.

A criminal trial is not, of course, to be likened to a game. It is an inquiry into truth in order that justice may be done. A trial, however, must be fair; and one of the requisites of a fair trial is that the accused be fairly advised of the nature of the offense for which he is being tried. He may not be tried for one offense and be convicted of another; but this is in substance what happens when he is assured by the prosecuting attorney and understands that he is being prosecuted for a misdemeanor under an indictment, which is inter-

preted for the first time after conviction to charge a felony.

We think, accordingly, that Clemons, under the circumstances of this case, was deprived of his liberty against the spirit, if not the letter, of the Due Process Clause of the Constitution of the United States. We think he has been dealt with unfairly in the light of our standards of justice towards those accused of federal crimes—standards, in our opinion, which the courts must always adequately safeguard and must, under all circumstances, zealously protect.”

There is no question but that defendants in the case at bar relied upon the statements and arrangement made, as hereinbefore set forth (R. pp. 61-62, 65-75, 81-88). They had sufficient cause for such reliance.

People v. Schwarz, 201 Cal. 309, is in point. It was there said, p. 314:

“Too much may not be done to purify and keep pure the administration of justice. If a defendant could not rely upon a covenant made with her by the head of the committee of the grand jury and the office of the district attorney, then indeed would our whole system of legal procedure be brought under the cloud of suspicion. It is far better that one woman go unpunished than that it be said that the officers of the law in charge of the prosecution of crimes may play fast and loose with their promises to defendants under indictment. Precedent for procedure for relief under these circumstances, where the facts warrant it, is found in the following cases: *People v. Perez*, 9 Cal. App. 265 (98 Pac. 870); *People*

v. Mooney, 178 Cal. 525, 529 (174 Pac. 325); *People v. Reid*, 195 Cal. 249 (36 A.L.R. 1435, 232 Pac. 457.)”

In *Paris v. United States*, 137 F. (2d) 300 (4 Cir.), the defendant's bail was ordered forfeited for failure to appear for trial. The defendant urged that “he was led to believe that he would receive further notice, before being required to appear before the Court”, to be given him by the United States attorney; that he relied upon the statement of said Attorney; that he received no notice, and hence did not appear (*id.* p. 301). Upon these contentions the Court said (p. 302):

“In stating that it was unnecessary for him to pass upon what statements were made by the District Attorney, we are of the opinion that the Judge below was in error as a matter of law. The District Attorney is the duly accredited prosecuting officer of the government with certain well defined duties with respect to the cases under his control. The defendant Paris and his friends would naturally be influenced by any statement or promise made by the District Attorney. That there was some arrangement, a perfectly proper one, under which the District Attorney was to give Paris some notice before it would be necessary for him to come to court is shown by the fact that the District Attorney did try to get word to Paris.

It is true that promises and representations made by a District Attorney to the defendant are not binding upon the District Judge, who presides at the trial of the case. Yet, in the instant

case, the alleged representations of the District Attorney have real evidential value in tending to show that here the default of the defendant was not willful.”

It is manifest that there was an understanding between defendants and the United States Attorney and attorneys for the OPA, but for which defendants would not have changed their pleas of not guilty. It is obvious that defendants relied and acted upon this understanding, which, in all essential respects and for all necessary purposes was an agreement between the parties. It is true, of course, that the trial Court was not bound by the agreement; but, when he repudiated the agreement he should have permitted defendants to withdraw pleas of guilty made pursuant to the agreement and reenter their pleas of not guilty. Defendants were surprised at the refusal of the trial Court to respect the agreement of the parties, and at the immediate judgment and sentence. A procedure, such as this, which “smacks of surprise, * * * should if possible be avoided” (*Clemons v. United States*, supra). And, it could have been avoided by granting defendants’ motion, made within twenty-four (24) hours thereafter, to vacate judgments and permit them to withdraw pleas of guilty induced by the agreement mentioned. Refusal of the trial Court to grant this timely motion was, we respectfully submit, error and abuse of discretion.

CONCLUSION.

For the reasons set forth herein it is respectfully submitted, (a) that the lower Court erred in rendering judgment, and (b) in refusing to vacate said judgment and grant a new trial.

Wherefore appellants pray that the judgments of the District Court be reversed and that a new trial be granted.

Dated, Los Angeles, California,
January 3, 1944.

Respectfully submitted,

ARON ROSENSWEIG and

ABE ROSENSWEIG,

Appellants.

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No. 10,540.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ARON ROSENSWEIG and ABE ROSENSWEIG,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 10,540.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ARON ROSENSWEIG and ABE ROSENSWEIG,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

This information was brought under Section 205(b) of the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U. S. C. Appendix, Section 901, *et seq.* Jurisdiction of the District Court was invoked under Section 205(c) of that Act. The judgments from which this appeal is prosecuted were entered on August 30, 1943 [R. 17, 19]. Notice of appeal was filed on behalf of both defendants on September 3, 1943 [R. 22, 27], and appeals consolidated [R. 46]. This court has jurisdiction of the appeal by virtue of Section 129 of the Judicial Code, 36 Stat. 1134, 28 U. S. C. Sec. 227.

Statutes and Regulations Involved.

This case involves the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U. S. C. Appendix Sec. 901, *et seq.*, as amended by the Act of Oct. 2, 1942, 56 Stat. 765, 50 U. S. C. App. Supp. II, Sec. 961, hereinafter referred to as the "Act"; Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381); Revised Maximum Price Regulation No. 148 (7 Fed. Reg. 8609), and Rule II (4) of the United States Supreme Court Rules of Criminal Procedure, 18 U. S. C. A. Supp. Sec. 688.

The pertinent provisions of the Act [set forth in the Appendix] may be summarized as follows:

Sections 1(a), 2(a), 2(c), 2(d), 2(g) and 2(h) set forth standards which govern the Administrator's exercise of his authority to control prices.¹ Section 4(a) makes it unlawful to violate any maximum price regulation. Section 201(d) authorizes the Administrator to issue regulations deemed necessary or proper to carry out the purposes of the Act. Regulations governing the procedures for administrative review of price regulations are based on this provision and on Section 203(a).

Sections 203 and 204 provide an exclusive procedure for administrative and judicial review of price and rent regulations; Sec. 204(d) prohibits all courts, except the Emergency Court of Appeals and the Supreme Court of the United States, from passing upon the validity of the regulations in any enforcement suit, as in the present case.

¹While Section 2 is the source of the Administrator's power to issue maximum price and rent regulations, note should also be had of Section 206, pursuant to which certain price "schedules" issued prior to enactment of the statute are made "effective."

Section 205(b) provides criminal sanctions for wilful violations of the prohibitions contained in Section 4(a). Section 205(c) establishes jurisdiction for enforcement suits.

Section 301 requires the Administrator to make quarterly reports to Congress.

Sections 302(a) to 302(c), and 302(i) define certain terms appearing in the price provisions of the Act.

Section 305 supersedes conflicting prior statutes.

The Act of October 2, 1942, 56 Stat. 765, 50 U. S. C. App., Supp. II, Sec. 961, *et seq.*, amended the Emergency Price Control Act of 1942, and its pertinent parts are also set out in the Appendix. Section 1 authorizes and directs the President to stabilize prices, wages, and salaries so far as practicable on the basis of levels prevailing on September 15, 1942. Section 2 provides the authority to implement the Congressional command contained in Section 1. Section 3 revises the methods used in prescribing price ceilings on agricultural commodities. Section 3 further provides that processors of agricultural commodities shall be allowed a "generally fair and equitable margin" for such processing—the same criterion as contained in Section 2 of the original Act. Sections 4 and 5 relate to wage and salary controls. Section 6 provides that this Act and the Regulations issued under it shall terminate on June 30, 1944, and Section 7(a) extends the life of the Emergency Price Control Act to June 30, 1944. Section 7(b) makes all administrative, procedural, and punitive sanctions contained in the Emergency Price Control Act applicable to this Act, and Section 7(c) provides that this Act shall in no manner invalidate any provisions of the original Act except as specifically listed. Sections

8, 9 and 10 relate to provisions concerning agriculture and definitions. Section 11 provides criminal penalties.

Revised Maximum Price Regulation No. 169 was issued on December 10, 1942, under Section 2 of the Act (7 F. R. 10381) and became effective December 16, 1942. This regulation prescribes certain basic prices (called zone prices) for various grades of beef carcasses and wholesale cuts (Sec. 1364.452). From these basic prices certain deductions are required to be made (Sec. 1364.453), and certain additions are permitted (Sec. 1364.454). Sec. 1364.401 prohibits the sale of beef and veal carcasses and wholesale cuts at prices higher than those permitted by the regulation, and Sec. 1364.406 prohibits evasion of the provisions of the Regulation. Grading is specifically required (Sec. 1364.411) and records and reports are required to be kept (Sec. 1364.407).

Revised Maximum Price Regulation No. 148 was issued under Section 2 of the Act (7 F. R. 8609) and became effective November 2, 1942. This regulation covers dressed hogs and wholesale pork cuts. Zone price ceilings were established (Sec. 1364.22) from which certain deductions are required to be made, and certain additions are permitted (Sec. 1364.35). Sec. 1364.21 prohibits the sale of dressed hogs and wholesale pork cuts at prices over the permitted maximum. Records are required to be kept (Sec. 1364.27) and evasion prohibited (Sec. 1364.26).

Rule II(4) of the Rules of Criminal Procedure promulgated by the Supreme Court (18 U. S. C. A. Supp. Sec. 688) requires that a motion to withdraw a plea of guilty "shall be made within 10 days after entry of such plea and before sentence is imposed."

Additional Statement of the Case.

This is an appeal from judgments of conviction [R. 17, 19] entered by the United States District Court for the Southern District of California, Central Division, on defendants' pleas of guilty [R. 15, 56] of criminal violations of the Act. The information was filed on July 15, 1943 [R. 2]. It charges Aron Rosensweig and Abe Rosensweig individually with wilfully selling processed meats at prices higher than those permitted by Revised Maximum Price Regulations No. 169 and 148 [R. 3-14]. The information alleges the issuance of Revised Maximum Price Regulations No. 169 (7 F. R. 10381) and 148 (7 F. R. 8609.) It contains six counts, with counts 1-5 detailing violations of Revised Maximum Price Regulation No. 169, and count 6 charging violations of Revised Maximum Price Regulation No. 148. Count 1 charges the sale of a wholesale cut of beef at a price substantially in excess of that prescribed by the Regulations. Counts 2-6 detail the sales of meats in excess of the established ceiling prices through the practice of entering the ceiling price on the invoice slip, and then demanding and receiving a "side payment" in excess of the ceiling price. All of the sales contained in the information were alleged to have occurred from April 24, 1943 to May 25, 1943.

Defendants filed a demurrer [R. 11-13] and motion to quash [R. 54-56], to the information.² These motions attacked the Act and Regulations No. 169 and 148 as unconstitutional and invalid [R. 11-12, 52-56]. On August 2, 1943, the motions were overruled by the District

²Defendant Abe Rosensweig filed a separate plea in abatement which was overruled [R. 56].

Court [R. 14, 56], and pleas of not guilty were entered to all counts of the information.

On August 11, defendants changed their pleas to one of guilty to counts 1 and 3 of the information [R. 15, 56], and counts 2, 4, 5 and 6 were subsequently dismissed [R. 15.] The case was then referred to the Probation Officer.

The hearing on the Probation Officer's report was held on August 30, 1943. The court stated that the offenses were deliberate and planned violations of the law [R. 60], and sentenced Aron Rosensweig to imprisonment for 30 days, and imposed a fine of \$1,000 [R. 17, 61]. Abe Rosensweig was fined \$1,000 but further sentence was suspended for a period of two years, on condition that he should not wilfully violate any provisions of price regulations issued under authority of the Act [R. 19, 61]. Attorney for defendants objected to the imposition of the jail sentence [R. 62], and detailed an alleged understanding with the United States Attorney's Office concerning the amount of the fines which were to be recommended to the court by the Probation Officer [R. 61].³ The Assistant United States Attorney categorically denied that any such commitment had been made [R. 62.] The court refused to modify the judgment stating that it was the duty of the court to impose the punishment, and that this discretion could not be fettered by agreements of counsel [R. 62].

Defendants filed a motion to vacate the judgments, to withdraw their pleas of guilty and reenter their pleas of

³A full treatment concerning this alleged understanding which defendants assert existed between defendants' attorneys, the United States Attorney's Office and the Probation Officer is treated fully in Point III of this brief *infra* at page

not guilty and for a new trial [R. 64,65]. Affidavits were filed by both parties [R. 63-72]. This motion was denied [R. 21] on the court's finding that defendants had not been deprived of any legal rights [R. 102-3].

On September 3, 1943, defendants filed notices of appeal [R. 22, 27]; and the appeals were ordered consolidated [R. 46].

Summary of Argument.

Defendants, by their specifications of error (Defendants' Brief, pp. 2-3) have raised three issues on this appeal: (1) the validity of Revised Maximum Price Regulations No. 169 and 148; (2) the validity of the Act, on the ground that it illegally delegates legislative powers to the Administrator in violation of Article 1, Section 1 of the Constitution; and (3) whether the District Court abused its discretion in refusing to vacate the judgment and refusing to permit defendants to withdraw their pleas of guilty and reenter their pleas of not guilty, and in refusing to grant a new trial.

All of these questions were decided adversely to defendants by the lower court. The ruling was clearly right, because:

(1) Defendants' objections addressed to the validity of the Regulations may not under the express provisions of Section 204(d) of the Act be considered by any court other than the Emergency Court of Appeals and the United States Supreme Court on certiorari. This section is clearly constitutional, and has been given full effect by federal courts. In this regard, defendants' assertion that Maximum Price Regulations No. 169 and 148 are invalid because they were not approved by the Secretary of Agriculture as provided by the Act, though barred from con-

sideration by Section 204(d), is in any event without merit. The Act only requires approval of ceilings placed on "agricultural commodities" and since the Revised Maximum Price Regulations here involved govern only meats processed from agricultural commodities, the requirement that the Secretary of Agriculture approve ceilings placed on "agricultural commodities" is patently inapplicable.

(2) Defendants' contention that the Act unlawfully delegates legislative power to the Administrator is without merit. The Act is well within the permitted constitutional limits both in respect to statement of legislature policy and in establishment of standards for the Administrator. Moreover, like the validity of the exclusive jurisdiction provisions of the Act, this question is no longer a novel one in the federal courts, for the decided cases have unanimously upheld the delegation of authority to the Administrator contained in the Act to control prices.

(3) Defendants' argument that the Trial Court abused its discretion in denying their motions to vacate the judgments, to withdraw pleas of guilty and reenter pleas of not guilty and for a new trial, is without merit on two grounds: (a) The motions were not in the nature of a writ of error *coram nobis* and therefore were not timely under Rule II(4) of the Supreme Court Rules of Criminal Procedure; and (b) in any event, the uncontested facts demonstrated that defendants were not deprived of any legal rights by certain alleged understandings with the Probation Officer and the United States Attorney's Office, and that in denying defendants' motions the court did not abuse its discretion, but on the contrary, meted out the only sentence which should have been imposed on these defendants.

ARGUMENT.

I.

Section 204(d) of the Emergency Price Control Act Constitutionally Precludes This Court From Con- sidering the Validity of the Maximum Price Regu- lations Here Involved.

The defendants in Point I of their brief (Defendants' Brief p. 5) attack Maximum Price Regulations No. 169 and 148 as unconstitutional and invalid. Specifically, defendants state that the regulations were not approved by the War Food Administrator as required by the Emergency Price Control Act, and Executive Order No. 9328. Defendants also urge that the regulations are unconstitutional and invalid because they deprive defendants of liberty and property without due process of law, and also that the basic Act upon which these regulations depend for vitality is unconstitutional, and that therefore these regulations necessarily fall with it. However, by the express provisions of Section 204(d) of the Emergency Price Control Act this court has been deprived of jurisdiction to consider the attacks made by defendants upon the validity of the regulations.⁴

Section 204(d) of the Act provides as follows:

"The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have ex-

⁴Defendants' assertion that the regulations deprive them of property without due process of law (Defendants' Brief at page 9) consists only of a bare allegation, without any attempt to show in what manner or in what way the regulations unlawfully deprive them of property. Therefore, apart from Section 204(d) of the Act, defendants may not ask this court to consider this constitutional question, because it is axiomatic that federal courts will not pass upon grave constitutional questions "hypothetically" where no specific injury has been shown. See *Liverpool, N. Y. and Philadelphia SS. Co. v. Commissioners of Immigration*, 113 U. S. 33, 36 (1885); and *Anniston Manufacturing Co. v. Davis*, 301 U. S. 337, 354 (1937).

clusive jurisdiction to determine the validity of any regulation or order issued under Section 2, of any price schedule effective in accordance with the provisions of Section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court—Federal, State or Territorial—shall have jurisdiction or power to consider the validity of any such regulation, order or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, or price schedule, or to restrain or enjoin the enforcement of any such provision.” (Emphasis added.)

Section 204(d) is the keystone of the plan established in Sections 203 and 204 of the Act for administrative reconsideration and judicial review of maximum price and rent regulation issued under the authority of Section 2 of the Act (or effective in accordance with Section 206). The statute affords to aggrieved persons subject to a regulation a comprehensive plan of administrative and judicial review. The statute and procedural regulations issued thereunder accord two types of administrative relief to petitioners: (1) a “protest” against the Regulations or any provision thereof (Act, Sec. 203; Procedural Regulation No. 1, subpart (d)); and (2) a “petition for amendment” of the regulations or any provision thereof (Procedural Regulation No. 1, subpart (c)), the latter being an additional remedy offered by the Administrator and not required by the Act, addressed to the Administrator’s “legislative” discretion. See *Bogart Packing Company v. Brown*, 138 F. (2d) 422 (Emerg. Ct. of App., 1943).

The statutory "protest" is required to be filed within 60 days from the date of issuance of the regulation complained of, or may be filed upon "new grounds" within 60 days from the date when the protestant had or might reasonably have had notice of such new grounds (Act, Sec. 203(a)). If the Administrator denies the protest in whole or in part, any aggrieved person is given the right of appeal to a special court created by the Act—the Emergency Court of Appeals.⁵ The jurisdiction of this court attaches upon the filing of a complaint (Section 204(a) and (c)). This court will have before it the entire administrative record made before the Administrator and all economic data considered by him. The court is vested with full authority to set aside any regulation or order which is shown to be "not in accordance with law or * * * to be arbitrary or capricious" (Section 204(b)). The court also possesses power, of course, to pass upon any proper challenge to the constitutionality of the Act itself. See *Lockerty v. Phillips*, 319 U. S. 182 (1943). The plan of administrative and judicial review established in Sections 203 and 204 of the Act has been held, in its various aspects, to fully meet the requirements of due process. See *Lockerty v. Phillips*, 319 U. S. 182 (1943); *Avant v. Bowles*, Emergency Court of Appeals, December 31, 1943, not yet reported; *Taylor v. Brown*, 137 F. (2d) 654 (Emergency Court of Appeals, 1943); cert. denied Nov. 15, 1943; *Montgomery Ward & Co. v.*

⁵The members of this court are designated by the Chief Justice of the United States from judges of the United States District Courts and Circuit Courts of Appeals. The Judges of the Emergency Court of Appeals are Calvert Magruder (1 Cir.), Albert B. Maris (3 Cir.), and Bolitha J. Laws (D. C., Dist. of Columbia). The Emergency Court of Appeals may sit in "such places as it may specify" (Section 204(c) of the Act). The Court has held sessions in New York, Philadelphia, Chicago, Boston, Cincinnati, Seattle, and Atlanta.

Bowles, 138 F. (2d) 669 (ECA, 1943); *Lakemore Co. v. Brown*, 137 F. (2d) 355 (ECA, 1943); and *Henderson v. Kimmel*, 47 F. Supp. 635 (D. C. Kans. 1942). The judgments of the Emergency Court of Appeals are reviewable by the United States Supreme Court on certiorari.

The considerations which impelled Congress to provide for exclusive jurisdiction to review regulations issued under authority of the Emergency Price Control Act were well summarized by the Court of Appeals for the First Circuit in the case of *Rottenberg v. U. S.*, 137 F. (2d) 850 (1st Cir., 1943, *certiorari* granted without opposition November 8, 1943). The court called attention to the need for avoiding the disruptions in continuity of control which would result from a particular court's holding a regulation invalid, saying: "All that a court could do would be to strike down; it could not draft and put in force a substitute regulation . . . If some commodities . . . (were) released from price control, even temporarily, the consequences might well be irretrievable, and, our economy being all of a piece, pressures would develop upon other commodities to break through their ceiling" (pp. 856, 857); to the need for avoiding too great a burden upon the experts charged with administering the program, saying: "If in every proceeding, civil or criminal, to enforce compliance with the regulations, the Administrator had to present the mass of economic data which might be required to establish the validity of the regulation, and to try the issue *de novo* as against each defendant, his predominant occupation would become fighting litigation rather than fighting inflation" (p. 857); and the need for channeling of judicial review through the Emergency Court, as described in the report of the Senate

Committee on Banking and Currency (Sen. Rep. No. 931, 77th Cong., 2d Sess., page 7) "in order to avoid the confusion which would result from conflicting decisions in different circuit courts on the same regulations. It will also permit the expeditious consideration and disposition of problems arising under the statute by a court familiar with its provisions and operations" (p. 855).

The above designated sections of the Act thus prescribe a procedure for the full consideration of the complicated economic and factual problems presented by a challenge to the validity of the Regulations, with full judicial review in a tribunal which has become expert in dealing with such questions and whose judgments are uniform throughout the land.

As a corollary to this scheme of review, limitations are placed upon the jurisdiction of all other courts, and the limitations here involved is as follows (Sec. 204(d)):

"Except as otherwise provided in this Section, *no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any* * * * *regulation issued under section 2 of the Act* * * *"
(Empasis supplied.)

The defendant in an enforcement proceeding under Section 205 of the Act, as in the instant case, is thus free to raise all proper defenses addressed to the constitutionality of the *Act* itself as distinguished from the regulations involved. The defendant may not however raise any defense addressed to the validity of the Regulation.⁶

⁶The Senate Committee on Banking and Currency, in favorably reporting out the present Section 204(d) stated (S. Rep. No. 931, 77th Cong., 2d Sess., p. 25): "Thus, the bill provides for exclusive jurisdiction in the Emergency Court and in the Supreme Court to determine the validity of regulations or orders issued under Section 2. Of course, the courts in which criminal or civil enforcement proceedings are brought have jurisdiction concurrent with the Emergency Court, to determine the constitutional validity of the statute itself."

The defendants in the present action have attacked the regulations on two grounds. Defendants state that the Regulations here involved have not been enacted in conformity with the Emergency Price Control Act, and are unconstitutional as depriving defendants of property without due process of law. However, as we have shown, Section 204(d) precludes consideration of the validity of these regulations. Defendants dispute the constitutionality of the regulations as well as the lack of statutory authority for the regulations. Both types of invalidity are covered by Section 204(d). In reporting out Section 204(d) the Senate Committee on Banking and Currency stated (S. Rep. No. 931, 77th Cong., 2 Sess., p. 24):

“Section 204(d) further provides expressly that no court other than the Emergency Court of Appeals and the Supreme Court shall have jurisdiction or power to consider the *validity, constitutional or otherwise*, of any regulation or order issued under Section 2.” (Emphasis supplied.)

This clear legislative intent has been given effect many times in cases arising under the Act. See *Henderson v. Burd*, 133 F. (2d) 515 (2 Cir., 1943); *Brown v. Oklahoma Operating Co.* (W. D. Okla., 1943), OPA Service 620:128; *Brown v. Liniavski et al.* (S. D. N. Y., 1943), OPA Service 620:308; and *Brown v. W. T. Grant Co.*; *Brown v. Newberry Co.*; *Brown v. J. C. Penny Co.*, and *Brown v. McCrory Stores* (S. D. N. Y., 1943), OPA Service 620.312. These cases hold that all courts other than the Emergency Court of Appeals are precluded by the provisions of Section 204(d) of the Act from considering the constitutional and statutory validity of any regulation issued under authority of the Act, and that

relief lies solely in the administrative and judicial review accorded defendants by Sections 203 and 204 of the Act.

All courts which have considered the question have held that the Emergency Court of Appeals has exclusive jurisdiction to consider both constitutional and statutory validity of regulations issued under the Act. Such holdings are eminently sound, for the disruptions which would result to the price control program by permitting decisions and possible conflict of decisions, as to statutory invalidity of regulations in the various state and federal judicial districts throughout the country, would be no less injurious to the war effort than the confusion caused by decisions which reach the same result on grounds of "unreasonableness" of regulations. It is therefore submitted that Section 204(d) of the Act prevents the consideration by this court of both the question of whether the regulation deprived defendants of property without due process of law, and of whether the regulation is invalid because it has not been approved by the Secretary of Agriculture or the War Food Administrator which defendants claim is required by the Act.

Defendants have not directly attacked the validity of the exclusive jurisdiction provisions of the Act, but have only urged that where a defendant is sued criminally, the court must determine whether the regulation is beyond the powers conferred upon the Department by Congress, citing 35 Harvard Law Review 952; *Panama Refining Co. v. Ryan*, 392 U. S. 388; as well as other cases.⁷

⁷It should be noted that even in the absence of a statutory provision such as Section 204(d), defendants would be barred from attacking the validity of the Regulations by the rule requiring the exhaustion of administrative remedies. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51 (1938); *Nick Falbo v. United States*, U. S. Supreme Court, decided January 3, 1944, 12 L. W. 4113 (prosecution for failure to report for induction, defendant may not question arbitrariness or validity of his classification); and *Bradley v. City of Richmond*, 227 U. S. 477, (1913).

Neither the case of *Panama v. Ryan* nor the law review article give consideration to statutory limitations such as Section 204(d) contains. This section expressly prevents such examination and this restriction has been fully upheld by Federal courts in numerous cases. See *Rottenberg v. United States*, 137 F. (2d) 850 (1 Cir., 1943), cert. granted Nov. 8, 1943; *Henderson v. Burd*, 133 F. (2d) 515 (2 Cir., 1942); *Brown v. Ayello*, 50 F. Supp. 391 (N. D. Calif., 1943); *U. S. v. Fitzsimmons Stores* (S. D. Calif., 1943), OPA Service 620:210; *U. S. v. C. Thomas Stores*, 49 F. Supp. 111 (D. C. Minn., 1943); *U. S. v. Krupnick*, 51 F. Supp. 982 (D. C. N. J., 1943); *U. S. v. Sosnowitz and Lotstein*, 50 F. Supp. 586 (D. C. Conn., 1943); *Henderson v. Kimmel*, 47 F. Supp. 635 (D. C. Kan., 1942); *Brown v. W. T. Grant* (D. C. N. Y., 1943), OPA Service 620:312; *Bowles v. Liniavski* (D. C. N. Y., 1943), OPA Service 620:308; *Brown v. Warner Holding Co.*, 50 F. Supp. 593 (D. C. Minn., 1943); and *U. S. v. Gregory* (D. C. Ky., 1943), OPA Service 620:266.

As we have shown, Section 204(d) withholds from this court jurisdiction to consider the challenge to the validity of these regulations to the effect that they must be approved by the War Food Administrator before their issuance, and that the failure to do so renders them invalid. Assuming, however, *arguendo*, that the court did have jurisdiction to consider such a challenge, the defendants are in error. The Emergency Price Control Act, as amended, provides for approval by the Secretary of Agriculture of all price ceilings placed upon "agricultural commodities." This authority has been transferred from the Secretary of Agriculture to the War Food Administrator

by Executive Order No. 9328, dated April 8, 1943.⁸ However, the two regulations here involved do not cover "agricultural commodities," they only embrace *processed* meats.

Since the regulations cover commodities processed from agricultural commodities rather than the agricultural commodities themselves, and since Section 3 of the Act treats agricultural commodities and commodities processed from agricultural commodities separately (see particularly Section 3(c)), it is clear that the Act did not require approval by the Secretary of Agriculture. In the case of *U. S. v. Charney*, 50 F. Supp. 581 (D. C. Mass., 1943), the same argument was made in regard to an indictment based upon Revised Maximum Price Regulation No. 169. In rejecting the attack, the court said:

"Section 3(e) of the Act requires the approval of the Secretary of Agriculture before any action is taken with respect to any 'agricultural commodities.' However, it would seem that a 'wholesale cut' is not an 'agricultural commodity' within the meaning of Section 3(e), but rather is a 'commodity processed from' and 'agricultural commodity' within the meaning of Section 3(c). If this is the correct construction, and I believe it is, it follows that the provisions of Section 3(e) is not applicable to 'wholesale cuts.'"

Therefore, apart from the effect to be given to Section 204(d) of the Act, defendants' argument is founded upon erroneous grounds.

⁸However, Maximum Price Regulation Nos. 169 and 148 were both issued before the transfer of authority by Executive Order 9328 from the Secretary of Agriculture to the War Food Administrator.

II.

The Emergency Price Control Act of 1942 Does Not Unlawfully Delegate Authority to Control Prices to the Administrator.

Defendants Point II of their brief (p. 9) attack the Act as constituting an invalid delegation of legislative power to the Administrator to control prices. This attack being one directed at the constitutional validity of the basic Act as distinguished from an attack on the regulations is open for consideration by this court. (See p. 13, footnote 6, *supra*.) We turn, therefore, to the issues presented by the Congressional delegation of authority to the Administrator.

A precise formulation of the outer limits of lawful delegation has never been attempted by the Supreme Court and, in any event, is unnecessary to this case. The degree of detail with which Congress must describe its policies and standards, vary with the character of the subject of regulation. In determining what Congress "may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination." *Hampton & Co. v. United States*, 276 U. S. 394, 406 (1928). "In dealing with legislation involving questions of economic adjustment, each enactment must be considered to determine whether it satisfies the purpose which the Congress seeks to accomplish and the standards by which that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits. Within these tests the Congress needs specify only so far as is reasonably practicable." (*United States v. Rock Royal Co-op.*, 307 U. S. 533, 574 (1939).)

The instant case is safely within the permitted limitation. The discretion of the Administrator is "not unconfined and vagrant."⁹ Rather it is canalized by unusual specificity. For, as we shall show, Congress has carefully defined both the ends to be achieved by the Act and the means by which the Administrator is to achieve them.

1. *Statement of Policy.* Section 1(a) of the Act sets forth the statutory objectives. It is declared to be in the interest of national defense and necessary to the effective prosecution of the war that measures be taken for various essential purposes, including stabilization of prices, prevention of inflationary increase in prices and rents, prevention of war time profiteering and other disruptive practices resulting from war time scarcities, and protection of persons with fixed and limited incomes against undue impairment of living standards. The legislative policy so expressed is definite and clear. It plainly satisfies the requirements which have been prescribed by the Supreme Court. See *Opp Cotton Mills v. Administrator*, 312 U. S. 126 (1941) (F. L. S. A.); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381 (1940) (Bituminous Coal Act); *United States v. Rock Royal Co-op*, 307 U. S. 533 (1939) (Milk Marketing Provisions and Agricultural Marketing Agreement Act); *Mulford v. Smith*, 307 U. S. 38 (1939) (Tobacco Market Quota Provisions of the Agricultural Adjustment Act).

2. *The Statutory Standards.* Sections 2(a), (c), (d), (g) and (h) of the Act set forth standards which govern the Administrator's exercise of his authority to control

⁹Cardozo, J., Dissenting. *Panama Refining Co. v. Ryan*, 293 U. S. 388, 440 (1935).

prices. The standards mentioned are detailed and specific; they carefully circumscribe the Administrator's discretion, guiding him as to when he may act and how he may act.

The Administrator may promulgate price regulations when in his judgment "the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act" (Act, Section 2(a)). The Act does not leave the promulgation of price regulations to the Administrator's subjective and unconfined discretion. He must examine the pertinent data objectively to determine whether the promulgation of a regulation will effectuate the Act's purposes.¹⁰ The grant of power, moreover, acquires meaning from the clearly stated objectives of the Act. Cf. *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U. S. 146, 165-166.

The Acts contain detailed standards governing the determination of maximum price levels. Not only must the prices fixed be "generally fair and equitable," and "effectuate the purposes of this Act" (Act, Section 2(a)), but in addition and going beyond the usual provisions

¹⁰The requirement that the Administrator must exercise "judgment" as to whether this action would achieve the Act's purposes does not vitiate the conclusion that his discretion in determining whether to act is properly circumscribed. A provision of this nature is as necessary to sensible regulation as it is familiar. Thus in *United States v. Rock Royal Co-op*, 307 U. S. 533 (1930) the Court held lawful a delegation of authority to the Secretary of Agriculture which provided that he might initiate action whenever he "has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title" (7 U. S. C. 608c(3)). Similarity in *Dakota Central Telephone Co. v. South Dakota*, 250 U. S. 163 (1919), the Court upheld the Joint Resolution of July 16, 1918, which authorized the President to take over the telephone system of the country "whenever he shall deem it necessary for the national security or defense * * * and to operate the same in such manner as may be needful or desirable" (40 Stat. 904). Plainly, the Act is not invalid simply because the Administrator is entitled to exercise his judgment, such an exercise is implicit in such standards as "public convenience and necessity," "public interest," "just and reasonable," and similar traditionally proper standards.

governing rate making, price fixing and wage determinations which contain the familiar requirements of fairness, equity, or reasonableness, there is here a statutory guide in terms of time, that is, in terms of prices actually prevailing as of a given period. The basic Act directs the Administrator to give consideration, so far as practicable, to prices prevailing between October 1 and October 15, 1941. By the amendatory Act (Act of October 2, 1942, 56 Stat. 765, 50 U. S. C. App. Supp. II, sec. 961 *et seq.*), stabilization of prices at the levels of September 15, 1942 is directed so far as practicable, a standard thus being provided for the guidance of the Administrator in holding fast against further price increases. It may be observed that the "dollars-and-cents" ceilings established by Revised Maximum Price Regulation No. 169 set prices at a level slightly higher than those prevailing between March 16 and March 28, 1942¹¹ and resulted in stabilization of beef prices on the basis of levels existing on September 15, 1942.¹²

The basic Act (Section 2(a)) also provides that adjustments in the determination of price levels take account of such relevant factors as the Administrator "may determine and deem to be of general applicability, including * * * Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits * * * during and subsequent to the year ended October 1, 1941."

¹¹See Statement of Considerations accompanying Revised Maximum Price Regulation No. 169, OPA Service 41:339. This document was filed with the Division of the Federal Register. Under Section 2.4(b) of the Federal Register Regulations, the Director has determined that filing constitutes compliance with the Federal Register Act (44 U. S. C., Sec. 301 *et seq.*) and has excluded statements of consideration from publication.

¹²*Id.*, OPA Service 41:341-C, 41:341-D.

Further, under Section 3 of the Act of October 2, the maximum price established for any commodity processed or manufactured in whole or in substantial part from any agricultural commodity must reflect to the producer of the commodity designated prices as set forth in two numbered clauses of the Section (Clauses 1 and 2 under Section 3). The provisions of the second clause may be waived upon a finding of necessity to correct gross inequities. Modifications must be made in maximum prices for agricultural commodities or products processed therefrom in any case where it appears that this is necessary to increase production of a commodity for war purposes, or where increased costs since January 1, 1941 are not reflected in maximum prices. Adequate weight must be given to farm labor in setting prices for both agricultural products and commodities processed therefrom.

Insofar as practicable, the Administrator must consult with industry representatives before issuing an order affecting them. Finally, the preservation of Congressional guardianship over the authority delegated is indicated by the requirement in Section 301 of the original Act that the Administrator make quarterly reports to Congress, by the provision of the Act limiting its duration to June 30, 1943 (Section 1(b)), and by the amendment thereto extending the life of the Act only to June 30, 1944 (Amendatory Act, Section 7(a)).

3. *Decisions under the Act.* The District Court in this case overruled defendants' demurrers to the indictment which attacked the Act as constituting an invalid delegation of legislative power to the Administrator to control prices. In so doing, the court below acted in accord with the unanimous court decisions on this point. Every court which has considered the validity of the dele-

gation of power granted to the Administrator to control prices has sustained that delegation.¹³

The Supreme Court of California in the case of *Miller v. The Municipal Court*, 142 P. (2d) 297 (Sept. 30, 1943), exhaustively considered and fully upheld the delegation of power to the Administrator to control prices. The court observed that:

"To demand that Congress should impose upon this shifting and complex scheme the relatively permanent holds of statutory provisions, unqualified by a large degree of administrative discretion, would nullify the effective operation of government regulation and render it unworkable. * * * In view of this situation, the United States Supreme Court has reduced the constitutional question to a comparatively simple explanation: Congress must state, insofar as is reasonably practicable, considering the nature of the subject matter and the regulation sought, the purpose which it seeks to accomplish and the standards by which that purpose is to be effectuated. It may then constitutionally delegate to an administrative agency the powers to determine the details essential to carry out the legislative purpose (*U. S. v. Rock Royal Co-op, supra*); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381 (60 S. Ct. 907, 84 L. Ed. 1263); *Opp Cotton Mills v. Administrator, supra*)." (142 P. (2d) at 305).

¹³This delegation of power has been sustained in the following cases: *Rottenberg v. United States*, 137 F. (2d) 850 (1 Cir., 1943); *cert. granted* November 8, 1943; *United States v. C. Thomas Stores*, 49 F. Supp. 111 (D. C. Minn. 1943); *Brown v. Ayello*, 50 F. Supp. 391 (N. D. Cal. 1943); *United States v. Fitzsimmons Stores* (S. D. Cal. 1943), OPA Service 620:210; *United States v. Krupnick*, 51 F. Supp. 982 (D. C. N. J. 1943); *United States v. Charney*, 50 F. Supp. 581 (D. C. Mass. 1942); *United States v. Sosnowitz*, 50 F. Supp. 586 (D. C. Conn. 1943); *United States v. Friedman*, 50 F. Supp. 584 (D. C. Conn. 1943); *Boreles v. Liniarski* (S. D. N. Y., decided December 13, 1943), OPA Service 620:308; *Miller v. Municipal Court*, 142 P. (2d) 297 (Supreme Court of California, Sept. 30, 1943), and *Brown v. W. T. Grant Co.* (S. D. N. Y., Dec. 14, 1943), OPA Service 620:312.

The court then quoted the provisions of Section 1(a) and 2 of the Act and in relation thereto stated:

"These declared policies and standards are as specific as, or even more than, many of the standards upheld in previous decisions by the U. S. Supreme Court." (142 P. (2d) at 306, 307.)¹⁴

* * * * *

"And insofar as the respondent objects to the action of Congress in allowing the Price Administrator to exercise certain powers when, in his judgment, a specified state of facts exists, the decision supports just such statutory provisions. For example, in *Dakota Central Telephone Co. v. S. D.*, 280 U. S. 163, 181 (39 S. Ct. 507, 63 L. Ed. 910), the court held valid a joint resolution authorizing the President to take over the telephone system of the country 'whenever he shall deem it necessary for the national

¹⁴The court then cited the following cases, and the applicable standards contained in the respective Acts: "*National Broadcasting Co. v. United States*, 316 U. S. 447 (62 S. Ct. 1214, 86 L. Ed. 1586); *Federal Radio Com. v. Nelson Bros. Co.*, 289 U. S. 266 (53 S. Ct. 627, 77 L. Ed. 1166, 89 A. L. R. 406) ("public convenience, interest, or necessity"); *New York Central Securities Corp. v. United States*, 287 U. S. 12 (53 S. Ct. 45, 77 L. Ed. 138) ("in the public interest"); *Chesapeake & Ohio Ry. Co. v. United States*, 283 U. S. 35 (51 S. Ct. 337, 75 L. Ed. 824), and *Colorado v. United States*, 271 U. S. 153 (46 S. Ct. 452, 70 L. Ed. 878) ("certificates of public convenience and necessity"); *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420 (50 S. Ct. 220, 74 L. Ed. 524) ("just and reasonable" commissions) *United States v. Chemical Foundation*, 272 U. S. 1 (47 S. Ct. 1, 71 L. Ed. 131), ("in the public interest"); *Mahler v. Eby*, 264 U. S. 32 (44 S. Ct. 283, 68 L. Ed. 549) ("undesirable resident"); *Monongahela Bridge Co. v. United States*, 216 U. S. 177 (30 S. Ct. 356, 54 L. Ed. 435), and *Union Bridge Co. v. United States*, 204 U. S. 364 (27 S. Ct. 367, 51 L. Ed. 523) ("unreasonable obstruction to navigation"); *Buttfield v. Stranahan*, 192 U. S. 470 (24 S. Ct. 349, 48 L. Ed. 525) ("purity, quality, and fitness for consumption"); and see Cheadle, *The Delegation of Legislative Functions*, 27 *Yale Law Jour.* 892, 901."

security or defense * * * and to operate * * * (it) in such manner as may be needful or desirable * * *.' Similarly, the Supreme Court approved a delegation of authority to the Secretary of War 'to do everything by him deemed necessary to suppress and prevent prostitution within such distances of army centers 'as he may deem needful.' *McKinley v. U. S.*, 249 U. S. 397 (39 S. Ct. 324, 63 L. Ed. 668). And in *U. S. v. Curtis Wright Export Corp.*, 299 U. S. 304 (57 S. Ct. 216, 81 L. Ed. 255), the court upheld Congressional delegation to the President of the power to prohibit the sale of arms to a country at war, upon his determination that such an embargo would 'contribute to the destruction of peace.' " (142 P. (2d) at 307.)

The court concluded that the Act clearly constituted a valid and constitutional delegation of legislative power. Statements contained in *Miller v. Municipal Court* are representative of similar statements contained in the cases in footnote 13, *supra*. This unanimous weight of judicial opinion and the principles of law upon which they are founded, are a conclusive answer to the contentions relied on by defendants in Point II of their brief.¹⁵

¹⁵Defendants state that the Administrator is given the power to define and create crimes and offenses against the United States through the promulgation of a regulation (Defendants' Brief, p. 15). The violations by defendants in the present case are violations, not of the regulation, but of Section 4(a) of the Act. See *United States v. Hark*, U. S. Supreme Court, decided January 3, 1944; *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936). See also *United States v. Krupnick*, 51 F. Supp. 982 (D. C. N. J., 1942).

III.

The District Court Did Not Err or Abuse Its Discretion in Refusing to Vacate the Judgments and Sentences and Permit the Appellants to Withdraw Their Pleas of Guilty and Re-enter Their Pleas of Not Guilty, and in Refusing a New Trial.

A.

THE DISTRICT COURT DID NOT HAVE JURISDICTION TO SET ASIDE APPELLANTS' PLEAS OF GUILTY AND ALLOW THEM TO ENTER PLEAS OF NOT GUILTY.

The appellants entered their pleas of guilty on August 11, 1943 [R. 15], and judgments of the District Court sentencing the defendants were entered on August 30, 1943 [R. 17-19; 19-20]. On August 31, 1943, the appellants filed their motion to withdraw their pleas of guilty and enter pleas of not guilty [R. 63]. The motion was therefore not only made after the sentence had been imposed, but also more than 10 days after the entry of the plea of guilty. The motion was therefore not timely made, and the District Court had no jurisdiction to grant such motion. (Rule 2(4) of Rules of Practice and Procedure in Criminal Cases.)

In *Farnsworth v. Zerbst* (5 Cir.), 98 F. (2d) 541, 543, the court discusses Rule 2(4) as follows:

“But it is further argued that an absolute right to withdraw the plea was established by the Act of Feb. 24, 1933, amended March 8, 1934, 28 U. S. C. A. §723a, authorizing the making of rules of procedure after conviction or pleas of guilty in criminal cases,

because of the proviso: 'Provided, that nothing herein contained shall be construed to give the Supreme Court the power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.' Accordingly Rule 2(4), 28 U. S. C. A. following section 723a, provides: 'A motion to withdraw plea of guilty shall be made within ten (10) days after entry of such plea and before sentence is imposed.' We are of opinion that a plea of *nolo contendere* is a plea of guilty within the Act and the Rule, but *they do not give any right to withdraw such pleas. They deal only with a limit of time within which the application to withdraw may be filed.* The principles on which it may be granted or denied remain unchanged." (Emphasis added.)

In *Farrington v. King* (8 Cir.), 128 F. (2d) 785, 787, the court states:

"The contention that Judge Reeves improperly denied petitioner's motion to set aside the plea of *nolo contendere* and in some way obstructed petitioner's efforts to appeal from the denial of the motion is without basis and without any color of merit. The motion was addressed to the discretion of the court and the order denying it was not appealable. *Benson v. United States*, 9 Cir., 93 F. (2d) 749, 751. Moreover, the motion was made more than ten days after the entry of the plea and after sentence was imposed, and was therefore too late. Rule 2(4) of the Rules of Practice and Procedure in Criminal Cases, promulgated by the Supreme Court of the United States, as amended, 18 U. S. C. A. following §688."

In *Lima v. U. S.* (6 Cir.), 89 F. (2d) 1012, the court held that appellant's motion to change his plea from guilty to not guilty must be made within ten days after the entry of his plea of guilty.

In *United States v. Schor* (D. C. N. Y.), 13 F. Supp. 399, affirmed in 85 F. (2d) 1020 (2 Cir.), the court held that a motion to withdraw a plea of guilty must be made before the imposition of sentence.

In *Cooke v. Swope* (D. C. Wash.), 28 F. Supp. 492, 494, the court stated:

"Strength is added to this conclusion by the fact that the rules of the Supreme Court governing criminal cases, which have the force of law, provide that, after a plea of guilty had been entered, the District Court, upon cause shown, may allow it to be changed within ten days after entry and before sentence. Rule II(4), 28 U. S. C. A. following Section 723a. *After that period, the District Court cannot allow a change of plea, and the government acquires the right to have judgment follow the plea.* The object of this rule was to do away with the rule previously obtaining which permitted a change of plea 'if for any reason the granting of the privilege seems fair and just,' *Kerchavel v. United States*, 1927, 274 U. S. 220, 225, 47 S. Ct. 582, 583, 71 L. Ed. 1009, and which no doubt, at times, worked for delay." (Emphasis added.)

In affirming the District Court this Honorable Court stated, in part, that "the facts are accurately stated and each point raised by appellant correctly treated (109 F. (2d) 955).

B.

THE FACTS OF THIS CASE WOULD NOT PROPERLY SUPPORT THE COMMON LAW WRIT OF ERROR CORAM NOBIS.

Counsel for appellant attempts to circumvent Rule 2(4) by arguing that the motion made on August 31st, was in effect a petition for the common law writ of error *coram nobis*. A consideration of this point, as well as the point as to abuse of discretion, requires a consideration of the facts presented to the District Court. While there is no substantial conflict in the facts except as to the point as to whether or not a portion of the report of the probation officer was read to counsel for appellants prior to sentence, because of certain phrases contained in appellants' brief which might be misleading,¹⁶ a statement of facts from the government's point of view should be given.

The Facts.

After the information had been filed, a demurrer, motion to quash, and plea in abatement, were entered seeking to dismiss the information. Upon a hearing on August 2, 1944, the court overruled these motions [R. 14, 56], and defendants then entered a plea of not guilty [R. 14, 56]. At this time, Samuel Mirman, attorney for defendants, approached Ray H. Kinnison, Assistant United States

¹⁶The portions of appellants' brief which the Government believes are misleading are: Page 2. "The understanding and arrangement was that defendants plead guilty to Counts One and Three of the Information and be fined \$125.00 each on each of said counts * * *." Page 17. "Upon this assurance they consented * * * to withdraw their pleas of not guilty to Counts One and Three of the Information." Page 18. "Affiant would not have recommended a change of plea had he not been assured * * *." Page 18. "Inasmuch as sentence was summarily imposed in announced disregard of an existing agreement * * *." Page 21. "There is no question but that defendants in the case at bar relied upon the statements and arrangements made * * *." Page 23. All of the last paragraph wherein it is stated that there was an agreement between the parties as to the nature of the sentence.

Attorney, and Roger Johnson, attorney for the Office of Price Administration, for the purpose of changing defendants' pleas to "guilty" [R. 66, 73, 76]. Mr. Mirman indicated that defendants would be willing to plead guilty to two counts of the information if the remaining counts were dismissed [R. 73, 76]. No mention was made of what sentence would or should be imposed. John W. Preston, former judge of the Supreme Court of California, and former U. S. Attorney for California [R. 88], then became associated with Mr. Mirman as counsel for defendants.

After studying the case, and notwithstanding the fact that in his opinion "the proof against the defendants was very weak and defective" and the validity of the law and the regulations "as applied to these defendants was very doubtful," Judge Preston advised appellant "that it was advisable to negotiate with the office of the District Attorney, looking toward a plea of guilty on some of the counts of the Information and a dismissal of the remaining counts." [Aff. of John W. Preston, R. 66.] Judge Preston then contacted Mr. Kinnison and asked him if a plea of guilty on two counts with a dismissal of the other counts of the information would be acceptable [R. 76]. The following day Judge Preston called at Mr. Kinnison's office and made further inquiry [R. 66, 76, 83]. Mr. Kinnison agreed that a plea of guilty to two counts would suffice if the legal staff of the Office of Price Administration approved [R. 67, 77, 83]. Judge Preston then asked what fines had been imposed by the courts for offenses of this character [R. 67, 77, 83], and was told that a fine of \$250.00 had been imposed by Judge Beaumont in a previous trial [R. 67, 77, 83].

Judge Preston then called upon the Office of Price Administration and talked to Mr. Roger Johnson, who informed Judge Preston that a plea of guilty on two counts would be satisfactory to the Office of Price Administration. Judge Preston then asked if any defendants had been sentenced to jail, and was told that none had been up to that time [R. 67, 74, 77].

Judge Preston then returned to see Mr. Kinnison on August 10 [R. 67, 77] and asked if he would recommend to the court a total fine of \$500.00 [R. 67, 77]. In reply, Mr. Kinnison stated that the United States Attorney's office would not recommend to the courts what sentences or fine should be imposed [R. 77-8, 67, 84], but that he would discuss the matter with the probation officer [R. 78, 68].¹⁷ Mr. Kinnison then talked to the probation officer [R. 78, 84] and informed that officer of Judge Preston's suggestion that a total fine of \$500.00 appeared reasonable. The probation officer stated that if the facts were as outlined, and if defendants' record were clear, that officer would recommend a moderate fine to the court [R. 78]. Mr. Kinnison then called Judge Preston and related the substance of the conversation to him [R. 78].¹⁸

Prior to the entry of their plea of guilty Mr. Preston had discussed with the appellants the question of the sen-

¹⁷Mr. Kinnison stated that no specific amount would be recommended by the United States Attorney's Office to the probation officer. [R. 78.] There is an inferential conflict between statements made by Judge Preston and Mr. Kinnison. Though Judge Preston did not say that a \$500.00 fine in terms of dollars and cents had been recommended to the probation officer [R. 68, 84], his position apparently was that such specific recommendation had been made; this is, however, only a logical inference from his statements.

¹⁸There is again an inferential disagreement between the statements of Mr. Kinnison and Judge Preston, for the latter infers that Mr. Kinnison in reporting the attitude of the probation officer declared that a specific sum had been mentioned and had been accepted by the probation officer.

tence and told them of the nature of his discussion with the United States Attorney's office. Mr. Preston, in this conversation, advised appellants that he could not guarantee what the sentence would be, that the court was not bound to follow any recommendation made to it, and that the matter of the sentence was entirely up to the court. [Testimony of John W. Preston, R. 86-87.] With this in mind, the appellants on August 11, 1943, pleaded guilty to Counts I and III of the Information.

On the day of the hearing on the report of the Probation Officer, Judge Preston called Mr. Kinnison to determine what the Probation Officer had recommended to the court. Mr. Kinnison stated that he read the last two paragraphs of the report of the Probation Officer to Judge Preston [R. 79].¹⁹ The latter denied the fact that the Probation Officer's report was read to him [R. 81, 69], but stated many times, both in affidavits and in testimony, that Mr. Kinnison told him that the Probation Officer had recommended "substantial" fines [R. 69, 81, 82, 85]. Judge Preston was also told that the Probation Officer's report did not bind the court [R. 79-80].

At the hearing on the report of the Probation Officer, the court fined defendant Aaron Rosensweig the sum of \$1,000.00 and sentenced him to the county jail for 30 days [R. 61]. Abe Rosensweig was fined \$1,000.00 and

¹⁹The Probation Officer's report reads as follows:

"Investigation has shown that Aron Rosensweig and Abe Rosensweig were violating price ceilings according to a well planned scheme. Their invoices of maximum prices and checks received from buyers show similar amounts. However, they accepted further cash payments on the side. OPA investigation indicates that thousands of dollars overcharge was probably made by this method.

Recommendation

"Because of the clear past record of these defendants, penitentiary sentence is not recommended. *It is recommended that they be given a heavy fine and placed on probation.*" (Emphasis supplied.)

further sentence suspended for two years [R. 61]. Judge Preston objected to the imposition of the jail sentence [R. 62], and detailed his alleged understanding with the United States Attorney and the Probation Officer [R. 61]. Mr. Kinnison stated that there had been no commitment made by the United States Attorney's office [R. 62]. The court then declared that no agreement between the parties as to the recommendation to the court could bind the court [R. 62], and refused to modify its sentence [R. 62].

Defendants filed motions to withdraw their pleas of guilty, substitute pleas of not guilty, and for a new trial. Affidavits were filed by both plaintiff and defendants. At a hearing on defendants' motions, the opportunity was again afforded defendants to show if any fraud or duress had been practiced. Charles H. Carr, United States Attorney, stated to the court that if injustice had been done the court should correct it, and that he would leave the problem to the sound discretion of the court [R. 100]. The court said, however, that there was no serious conflict in the affidavits except as to whether the report of the Probation Officer had been read by Mr. Kinnison to Judge Preston [R. 100]. But even in this posture of the facts, the court concluded there was no serious conflict, because Judge Preston had repeatedly stated that Mr. Kinnison had told him that the Probation Officer had recommended "substantial" fines [R. 101], and that therefore the only complaint defendant could possibly have was the exercise by the court of its undeniable right to enter judgment in accordance with the demand of the facts of the case [R. 102-3]. The court concluded that defendants had not been misled, and in a reasonable and proper exercise of its discretion, denied defendants' motions.

Argument.

Whether a motion of the type made in this case should be treated as in the nature of a writ of error *coram nobis* was decided by this court in the case of *Robinson v. Johnson*, 118 F. (2d) 998 (9th Cir., 1941), cert. den. 62 S. Ct. 177. The court there held that where the motion to the trial court is based upon facts "that properly would have been brought to the court's attention at common law by the writ of error *coram nobis*, such motion may be made after the expiration of the time fixed for such motions by Rule II, *supra*." The correctness of this decision has been questioned by this court in the subsequent case of *Crockett v. United States*, 125 F. (2d) 547 (9th Cir. 1942, cert. den. 316 U. S. 701). Since it is our position that the facts in this case would not justify the issuance of a writ of error *coram nobis*, the questionable precedent established by the *Robinson* case is therefore inapplicable.

See also:

Kelly v. United States, 9 Cir., 138 F. (2d) 489;
Young v. United States, 5 Cir., 138 F. (2d) 838;
Meredith v. United States, 6 Cir., 138 F. (2d) 772;
Strong v. United States, 5 Cir., 53 F. (2d) 820.

The California Supreme Court has defined the office of this writ in the following words:

"The uniform conclusion of the decisions is that the function of a writ of error *coram nobis* is to correct an error of fact. It never issues to correct an error of law nor, so far as we have been able to ascertain, has it ever issued to redress an irregularity occurring at the trial, such as misconduct of the jury,

or of the court, or of any officer of the court (except under circumstances amounting to extrinsic fraud, which in effect deprived the petitioner of a trial upon the merits). * * *

“It appears that in each case where the writ of error *coram nobis* has issued to vacate a judgment, it has been upon the ground that such judgment was predicated upon the assumed existence of a fact or a condition which did not in truth exist, and the non-existence of which would have prevented the rendition of the judgment if it had been known.”

People v. Reid, 195 Cal. 249, 254, 255; 232 Pac. 457, 461; 36 A. L. R. 1435.

“The writ of error *coram nobis* is not intended to authorize any court to review and revise its opinions, but only to enable it to recall some adjudication made while some fact existed which, if before the court, would have prevented the rendition of the judgment, and which without fault or negligence of the party, was not presented to the court. I Freeman on Judgments, §94.”

People v. Mooney, 178 Cal. 525, 528; 174 Pac. 325, 326.

This Honorable Court, in *Robinson v. Johnston*, *supra*, at page 1001, states the rule as follows:

“The general rule in regard to the writ of error *coram nobis* is that its purpose is to bring to the attention of the court some fact which was unknown to the court which, if known, would have resulted in a different judgment.”

Conceding for the purpose of argument only that the United States Attorney had agreed to recommend a fine of \$125.00 for each defendant, such an agreement would certainly not have “prevented the rendition of the judgment” imposed by the District Court. (*People v. Reid, supra.*) It is the function and the duty of the Court to exercise its own judgment and discretion, free from any commitments or agreements made by counsel. The District Court did use its own judgment and discretion in this case, free from any recommendation made, as evidenced by the Court’s own statement.

“As far as making a recommendation is concerned, the Probation Officer did make a recommendation. The only break in the whole proceeding is that the Court exercised its own independent judgment. That seems to have been the trouble in this case.” [R. 102.]

It should be noted that the trial court did not specifically decide whether this motion was properly one in the nature of writ of error *coram nobis* when the question was presented to it, but stated that it would decide the motion on the merits of the case [R. 61]. However, it is clear that on the facts of this case the motions were not in the nature of a writ of error *coram nobis*, and therefore, were improper.

The facts of this case reveal no fraud, duress, or other extrinsic grounds for which a writ of error *coram nobis* would lie at common law. The court found that there had been no misunderstanding which deprived defendants of any legal rights. Defendants were represented by able counsel, one of whom, Judge Preston, had been both a United States Attorney and a Judge of the Supreme Court

of California. The court further found that the only surprise to which defendants could point, was the failure of the court, in the exercise of its admitted discretion, to follow the Probation Officer's recommendation. In such a situation, a writ of error *coram nobis* will not lie.

Furthermore, defendants were given full opportunity to present and did present the basic facts relied on by them to show an agreement between the United States Attorney, the Probation Officer and the defendants as to the amount of the fine to be imposed. Defendants presented the essential facts of this agreement to the court at the time sentence was imposed, but the court refused to modify the sentence, stating that no agreement made by any of the parties involved could be binding upon the court. Since a writ of error *coram nobis* is applicable only to show facts which were unknown to the courts at the time of entry of judgment and sentence and which if known would have resulted in a different judgment and sentence (*Robinson v. Johnston*, 118 F. (2d) 547 (9th Cir., 1941), and since the basic facts were made known to the court at the time of judgment and sentence, a writ of error *coram nobis* will not lie. Cf. *Crockett v. United States*, 125 F. (2d) 547 (9th Cir., 1942).

For these reasons, defendants' motions were not in the nature of a writ of error *coram nobis*. Since the motions were filed after sentence, and therefore failed to comply with Rule II(4), defendants' motions came too late and were improper. See *Farrington v. King*, 128 F. (2d) 785 (8th Cir., 1942); *Cooke v. Swope*, 28 F. Supp. 492 (W. D. Wash., 1939); *United States v. Shor*, 13 F. Supp. 399 (E. D. N. Y., 1936); and *United States v. Bayaud*, 23 Fed. 721 (S. D. N. Y., 1883).

C.

THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' MOTIONS TO WITHDRAW THEIR PLEAS OF GUILTY, SUBSTITUTE THEIR PLEAS OF NOT GUILTY, AND FOR A NEW TRIAL.

The court, upon consideration of affidavits filed by plaintiff and defendants, and after a full presentation of arguments relied on by defendants to sustain their motions, denied these motions. In so doing, the court acted well within the realm of discretion conferred upon it, which this court should not disturb. See, *e. g.*, *Fogus v. United States*, 34 F. (2d) 97 (4th Cir., 1929); and *Crockett v. United States*, 125 F. (2d) 547 (9th Cir., 1942), cert. den. 316 U. S. 701. There are more than ample facts to sustain the action of the trial court.

As the trial court stated [R. 100, 101], there was no serious conflict as to the agreements upon which defendants claimed they had been misled. Defendants' attorney, Judge Preston, according to his affidavit, declared that he had been informed that a total fine of \$500.00 had been recommended by Mr. Kinnison to the Probation Officer. The Probation Officer stated, after talking with Mr. Kinnison, that if the facts were true as presented to him, a moderate fine would be recommended to the court. In substance these two statements are not conflicting, and certainly did not work to any disadvantage to the defendants. Judge Preston stated in his affidavit and testified that upon calling up Mr. Kinnison the morning of the hearing, Mr. Kinnison related the contents of the Probation Officer's report, and stated that this report had recommended a "substantial" fine. Mr. Kinnison, on the other hand, averred that he had read the last two paragraphs of the report over the telephone to Judge Preston.

The report, as a matter of fact, recommended the imposition of a heavy fine with no imprisonment due to the previous clear record of the defendant. Thus, Judge Preston knew that the report did not recommend a prison sentence, but recommended substantial or heavy fines. It is indeed difficult to understand how defendant can argue that he was misled by the statements made by Mr. Kinnison even in the light of Judge Preston's own testimony.

Apart from this, it was brought out in the testimony and in the affidavit filed by Mr. Kinnison that Judge Preston had been informed that an agreement between the Probation Officer, the United States Attorney, and the defendants to recommend certain fines to be imposed on defendants, would not be binding upon the court. Judge Preston further testified that he was entirely aware of this fact, and that he had advised his clients of this rule. In this respect, Judge Preston testified as follows:

“The Court: What I am getting at, Judge, is that you reported your discussion with the United States Attorney's office and made the recommendation, and you most certainly advised your clients that you couldn't guarantee any such result? A. No, I couldn't guarantee the result.

The Court: I mean, you didn't so advise them? A. I did not. I told them I thought the recommendation of the Probation Officer would be accepted, in all likelihood *in toto*, but that, of course, nothing could be guaranteed about that.

The Court: Didn't you advise your clients, Judge, that any proposed arrangement with the United States Attorney would be subject to the will of the Court and the conscience of the Court? A. I think that was understood, so that there was no use commenting on that subject. There is a liaison between

the United States Attorney and the Federal Court, and the defendants have a right to rely on assurances made by the United States Attorney's office.

Q. Mr. Carr: You did so advise your clients, however, that it would be subject to the conscience of the Court? A. Well, that may have been, in substance, what I told them, that I thought the law hadn't been passed on, and it was doubtful whether it was valid or not, and that no Court would impose any imprisonment sentences under conditions like that, in my opinion * * *." [R. 87.]

In this posture of the case, it is difficult to understand how defendants could have been misled. As the District Court stated. "It would almost be beyond comprehension that a man of Judge Preston's ability and experience and understanding would be misled or his clients would be misled." [R. 103.]

As the trial court concluded, defendants' basic complaint is simply that the court did not follow the recommendations contained in the Probation Officer's report. But it is well established law that the imposition of a sentence or a fine greater than that recommended does not constitute reversible error. As the court said in *People v. Manriques*, 188 Cal. 602, 206 Pac. 63 (1922): "The fact that a defendant, knowing his rights and the consequences of his act, hoped or was led by his counsel, or others, to hope or believe that he would receive a milder punishment by pleading guilty than that which would fall to his lot after trial and conviction by a jury, presents no ground for the exercise of the discretion necessary to permit a plea of guilty to be withdrawn."

United States v. Fox, 130 F. (2d) 56 (3 Cir., 1942), involved a motion by a defendant to set aside a plea of guilty to a charge of conspiracy. The court after observing that the accused was represented by able counsel, said:

“The appellant does not claim that the agreement originally made or the subsequent recommendation of the Attorney General binds the trial court as a matter of law. The argument is rather that the facts as presented should have moved the trial court to grant the petition as a matter of discretion.

* * * * *

“With full knowledge of the facts and possible legal consequences he took, under careful legal advice, a course of action. He kept his agreement; the prosecuting officers kept theirs, but the judge who had the responsibility for determining the question did not choose to follow the recommendation made. The discretion so to act was for him to exercise * * *.” (130 F. (2d) at p. 59.)

In *People v. Schwartz*, from which counsel for appellants quote, also contains the following pertinent language:

“The case of *People v. Miller*, 114 Cal. 10, 16, 45 P. 986, 987, it is said, supports the action of the trial court, but it is not in the same category with the case before us as to the facts thereof. There the defendant was led by the advice of his counsel to believe that he would get less punishment if he changed his plea to guilty than he would receive if he stood trial and was convicted. In this hope, however, he was disappointed. The court rightly held that with full knowledge of the consequences

which might follow he should not be permitted to speculate upon the action of the court.”

People v. Schwartz, 201 Cal. 309, 315; 257 Pac. 71, 73.

To the same effect. see also:

People v. Gottlieb, 25 Cal. App. (2d) 411; 77 P. (2d) 489;

People v. Sciunzi, 140 Cal. App. 70; 34 P. (2d) 1044;

People v. Michaels, 124 Cal. App. 41; 12 P. (2d) 137;

24 C. J. S., p. 140, notes 43 and 44.

Another point of interest is that the appellants do not deny the commission of the acts charged in the information. In appellants' own affidavits there is not the slightest indication of such denial. The most that the appellants say is that their counsel advise them “that the evidence of the Government is weak and defective,” and “that there was grave doubt as to the validity of the law and of the regulations under it.” [R. 71.] In his affidavit Judge Preston makes substantially the same statement [R. 66]. Judge Preston also testified that he advised his clients: “You have got a 50-50 chance to beat this case.” [R. 86.] These are certainly not denials of the commission of the acts charged. On the other hand, in his statement to the court prior to sentence, Judge Preston admitted that the appellants had committed the acts charged when he stated: “The act they committed, Your Honor, was one, not of moral turpitude, but one of self preservation” [R. 58], and, “I trust Your Honor will be lenient with them, and I pledge you they will not disobey these rules any more.” [R. 59.]

This point is mentioned because it throws additional light on the attitude of the appellants. If the appellants had taken the position that they had not committed the acts charged, but had pleaded guilty on the assurance of a small fine rather than to go to trial, an entirely different situation would be presented. But the appellants admitted the commission of the acts charged, and speculated on the amount of the sentence. (*People v. Schwartz, supra.*)

An examination of the affidavits and testimony make it apparent that the trial court reasonably exercised its discretion in denying defendants' motions. Defendants were represented by able and experienced counsel and were not misled to their disadvantage by any statements made by the United States Attorney's office. Defendants were advised and were well aware that the court had the right and the power to exercise its own judgment as to the punishment which would be meted out, and having pleaded guilty with full knowledge of the legal consequences such a plea entails and not having denied the commission of the acts alleged in the information, may not complain that they should be relieved from the legal consequences of their plea. It is respectfully submitted that the trial court acted well within the bounds of judicial discretion.

Conclusion.

For the reasons stated, the judgments below should be affirmed.

Respectfully submitted,

CHARLES H. CARR,

United States Attorney,

JAMES M. CARTER,

RAY H. KINNISON,

Assistant United States Attorneys.

APPENDIX.

Emergency Price Control Act.

TITLE I—GENERAL PROVISIONS AND AUTHORITY.

Purposes; Time Limit; Applicability.

Section 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producer, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production

Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

Prices, Rents, and Market and Renting Practices.

Sec. 2 (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in

profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, with-

out regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provision of this subsection. * * *

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.

(d) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices (including practices relating to changes in form or quality) or hoarding, in connection with any commodity, and speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations, which in his judgment are equivalent

to or are likely to result in price or rent increases, as the case may be, inconsistent with the purposes of this Act. * * *

(g) Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

(h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.

Prohibitions.

Sec. 4 (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202(b) or section 205(f), or to offer, solicit, attempt, or agree to do any of the foregoing.

TITLE II—ADMINISTRATION AND ENFORCEMENT.

Administration.

Sec. 201 (d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.

Procedure.

Sec. 203 (a) Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and

other facts of which the Administrator has taken official notice.

(b) In the administration of this Act the Administrator may take official notice of economic data and other facts, including facts found by him as a result of action taken under section 202.

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs.

Review.

Sec. 204 (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order,

or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence, which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition

becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act: except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C. 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Enforcement.

Sec. 205(b) Any person who wilfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or

filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4(c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

(c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Except as provided in section 205(f) (2), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the United States Government in any proceeding under this Act.

TITLE III—MISCELLANEOUS.

Quarterly Report.

Sec. 301. The Administrator from time to time, but not less frequently than once every ninety days, shall transmit to the Congress a report of operations under this Act. If the Senate or the House of Representatives is not in session, such reports shall be transmitted to the Secretary of the Senate, or the Clerk of the House of Representatives, as the case may be.

Definitions.

Sec. 302 (a) The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms "sell," "selling," "seller," "buy," and "buyer," shall be construed accordingly.

(b) The term "price" means the consideration demanded or received in connection with the sale of a commodity.

(c) The term "commodity" means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity:

Provided, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services. * * *

(i) The term "maximum price," as applied to prices of commodities means the maximum lawful price for such commodities, and the term "maximum rent" means the maximum lawful rent for the use of defense-area housing accommodations. Maximum prices and maximum rents may be formulated, as the case may be, in terms of prices, rents, margins, commissions, fees, and other charges, and allowances.

Application of Existing Law.

Sec. 305. No provision of law in force on the date of enactment of this Act shall be construed to authorize any action inconsistent with the provisions and purposes of this Act.

INFLATION CONTROL ACT OF 1942 (NEW).

56 Stat. 765, 50 U. S. C. App. Supp. II

Sec. 961, *et seq.* 961, through 971.

§961. Stabilization by President of prices, wages, and salaries affecting cost of living; public utility rate increase.

“In order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided*, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase. Oct. 2, 1942, c. 578, §1, 56 Stat.—

§962. Regulations; delegation of authority, suspension of certain provisions of Emergency Price Control Act of 1942.

“The President may, from time to time, promulgate such regulations as may be necessary and proper to carry

out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3(a) and 3(c), and clause (1) of section 302(c), of the Emergency Price Control Act of 1942 (Sections 903(a), 903(c), and 942(c)(1) of this Appendix) to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act, suspend any other law or part thereof. Oct. 2, 1942, c. 578, §2, 56 Stat.—

§963. Maximum prices for agricultural commodities and products.

“No maximum price shall be established or maintained for any agricultural commodity under authority of this Act or otherwise below a price which will reflect to producers of agricultural commodities the higher of the following prices, as determined and published by the Secretary of Agriculture.—

(1) The parity price for such commodity (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials or, in case a comparable price has been determined for such commodity under and in accordance with the provisions of section 3(b) of the Emergency Price Control Act of 1942 (section 903(b) of this Appendix), such comparable price (adjusted in the same manner), or

(2) The highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942 (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials, of, if the market for such commodity was

inactive during the latter half of such period, a price for the commodity determined by the Secretary of Agriculture to be in line with the prices, during such period, of other agricultural commodities produced for the same general use;

and no maximum price shall be established or maintained under authority of this Act or otherwise for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to the producers of such agricultural commodity a price therefor equal to the higher of the prices specified in clauses (1) and (2) of this section: *Provided*, That the President may, without regard to the limitation contained in clause (2), adjust any such maximum price to the extent that he finds necessary to correct gross inequities, but nothing in this section shall be construed to permit the establishment in any case of a maximum price below a price which will reflect to the producers of any agricultural commodity the price therefor specified in clause (1) of this section: *Provided further*, That modifications shall be made in maximum prices established for any agricultural commodity and for commodities processed or manufactured in whole or substantial part, from any agricultural commodity, under regulations to be prescribed by the President in any case where it appears that such modification is necessary to increase the production of such commodity for war purposes, or where by reason of increased labor or other costs to the producers of such agricultural commodity incurred since January 1, 1941, the maximum price so established will not reflect such increased costs; *Provided further*, That in the fixing of maximum prices on products resulting from the processing of agricultural com-

modities, including livestock, a generally fair and equitable margin shall be allowed for such processing; *Provided further*, That in fixing price maximums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, as provided for by this Act, adequate weighting shall be given to farm labor. Oct. 2, 1942, c. 578, §3, 56 Stat.—

§964. Wages and Salaries; limitations on control.

“No action shall be taken under authority of this Act with respect to wages or salaries (1) which is inconsistent with the provisions of the Fair Labor Standards Act of 1938, as amended (Title 5, §616; Title 29, §201 *et seq.*), or the National Labor Relations Act (Title 29, §151 *et seq.*), or (2) for the purpose of reducing the wages or salaries for any particular work below the highest wages or salaries paid therefor between January 1, 1942, and September 15, 1942; *Provided*, That the President may, without regard to the limitation contained in clause (2), adjust wages or salaries to the extent that he finds necessary in any case to correct gross inequities and also aid in the effective prosecution of the war. Oct. 2, 1942, c. 578, §4, 56 Stat.—

§965. Same; prohibition of violation of regulations; employer's reduction of salaries over \$5,000; regulation of payment of double time.

“(a) No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act. The President shall also prescribe the extent to which any wage or salary payment made in contravention of such regulations shall be disregarded by the executive depart-

ments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation.

(b) Nothing in this Act shall be construed to prevent the reduction by any private employer of the salary of any of his employees which is at the rate of \$5,000 or more per annum.

(c) The President shall have power by regulation to limit or prohibit the payment of double time except when, because of emergency conditions, an employee is required to work for seven consecutive days in any regularly scheduled work week. Oct. 2, 1942, c. 578, §5, 56 Stat.—

§966. Termination of Act.

“The provisions of this Act (except sections 8 and 9) (sections 968 and 969 of this Appendix, and amendments to Title 15, §713a-8), and all regulations thereunder, shall terminate on June 30, 1944, or on such earlier date as the Congress by concurrent resolution, or the President by proclamation, may prescribe. Oct. 2, 1942, c. 578, §6, 56 Stat.—

§967. Emergency Price Control Act of 1942, amendment; applicability of, and construction with, this Act.

“(a) Section 1-(b) of the Emergency Price Control Act of 1942 (section 901(b) of this Appendix) is hereby amended by striking out ‘June 30, 1943,’ and substituting ‘June 30, 1944.’

(b) All provisions (including prohibitions and penalties) of the Emergency Price Control Act of 1942 (section 901 *et seq.* of this Appendix) which are applicable with respect to orders or regulations under such Act shall,

in so far as they are not inconsistent with the provisions of this Act, be applicable in the same manner and for the same purpose with respect to regulations or orders issued by the Price Administrator in the exercise of any functions which may be delegated to him under authority of this Act.

(c) Nothing in this Act shall be construed to invalidate any provisions of the Emergency Price Control Act of 1942 (section 901 *et seq.* of this Appendix) (except to the extent that such provisions are suspended under authority of section 2 (section 962 of this Appendix)), or to invalidate any regulation, price schedule, or order issued or effective under such Act. Oct. 2, 1942, c. 578, §7, 56 Stat.—

§968. Crop loans.

“(a) The Commodity Credit Corporation is authorized and directed to make available upon any crop of the commodities cotton, corn, wheat, rice, tobacco, and peanuts harvested after December 31, 1941, and before the expiration of the two-year period beginning with the 1st day of January immediately following the date upon which the President by proclamation or the Congress by concurrent resolution declares that hostilities in the present war have terminated, if producers have not disapproved marketing quotas for such commodity for the marketing year beginning in the calendar year in which such crop is harvested, loans as follows:

(1) To cooperators (except cooperators outside the commercial corn-producing area, in the case of corn) at the rate of 90 per centum of the parity price for the commodity as of the beginning of the marketing year;

(2) To cooperators outside the commercial corn-producing area, in the case of corn, at the rate of 75 per centum of the rate specified in (1) above;

(3) To noncorporators (except noncooperators outside the commercial corn-producing area, in the case of corn) at the rate of 60 per centum of the rate specified in (1) above and only on so much of the commodity as would be subject to penalty if marketed.

(b) All provisions of law applicable with respect to loans under the Agricultural Adjustment Act of 1938, as amended (Title 7, §§612c, 1281 *et seq.*; Title 15, §§713c, 713c-1; Title 16, §§590h, 590c), shall, in so far as they are not inconsistent with the provisions of this section, be applicable with respect to loans made under this section.

(c) In the case of any commodity with respect to which loans may be made at the rate provided in paragraph (1) of subsection (a), the President may fix the loan rate at any rate not less than the loan rate otherwise provided by law if he determines that the loan rate so fixed is necessary to prevent an increase in the cost of feed for livestock and poultry and to aid in the effective prosecution of the war. Oct. 2, 1942, c. 578, §8, 56 Stat.—

§969. Amendment of provision relating to encouragement of production of non-basic agricultural commodities.

“(A) Section 4(a) of the Act entitled ‘An Act to extend the life and increase the credit resources of the Com-

modity Credit Corporation, and for other purposes' approved July 1, 1941 (U. S. C. 1940 edition, Supp. I, title 15, sec. 713a-8), as amended—

(1) By inserting after the words 'so as to support' a comma and the following: 'during the continuance of the present war and until the expiration of the two-year period beginning with the 1st day of January immediately following the date upon which the President by proclamation or the Congress by concurrent resolution declares that hostilities in the present war have terminated.'

(2) By striking out '85 per centum' and inserting in lieu thereof '90 per centum.'

(3) By inserting after word 'tobacco' a comma and the word 'peanuts.'

(b) The amendments made by this section shall, irrespective of whether or not there is any further public announcement under such section 4(a), (Title 15, §713-8(a)), be applicable with respect to any commodity with respect to which a public announcement has heretofore been made under such section 4(a) (Title 15, §713-8(a), Oct. 2, 1942, c. 578, §9, 56 Stat.—

§970. Definition of wages and salaries.

"When used in this Act, the term 'wages' and 'salaries' shall include additional compensation, on an annual or other basis, paid to employees by their employers for personal services (excluding insurance and pension benefits in a reasonable amount to be determined by the Presi-

dent); but for the purpose of determining wages or salaries for any period prior to September 16, 1942, such additional compensation shall be taken into account only in cases where it has been customarily paid by employers to their employees. Oct. 2, 1942, c. 578, §10, 56 Stat.—

§971. Violations; penalties.

“Any individual, corporation, partnership, or association wilfully violating any provision of this Act, or of any regulation promulgated thereunder, shall, upon conviction thereof, be subject to a fine of not more than \$1,000, or to imprisonment for not more than one year, or to both such fine and imprisonment. Oct. 2, 1942, c. 578, §11. 56 Stat.—”

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No. 10,540

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ARON ROSENSWEIG and ABE ROSENSWEIG,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' SUPPLEMENTAL BRIEF.

Statement.

The Information filed against defendants (appellants) in the District Court contained six counts. Four of these counts, *i. e.*, Counts II, IV, V and VI, were dismissed by the Government before the trial and are, therefore, not before this Court.

Nor is Count III of the Information before this Court for reasons immediately following. The trial court found defendants guilty on Count III, but the judgment of the Court provided, as to each defendant, that

“* * * the imposition of sentence on Count Three is suspended for the period of two (2) years and defendant is placed on probation for said period of two years * * *.”

Since imposition of sentence on Count III was suspended by the trial court and defendants were placed on probation as to said count for two years, there was no final judgment on Count III and hence the appeal herein does not bring that count before this Court. See *United States v. Albers*, 2 Cir., 115 F. (2d) 833, where the rule applicable here was stated, at page 834, as follows:

“The appeals of the five appellants placed on probation with imposition of sentence suspended must be dismissed. There is a distinction between suspending execution of sentence and suspending imposition of sentence. If sentence is imposed but execution thereof suspended, there is a final judgment from which an appeal will lie. *Berman v. United States*, 302 U. S. 211, 58 S. Ct. 164, 82 L. Ed. 204. But if imposition of sentence is suspended, no final judgment is entered; hence no appeal is possible. *Birnbaum v. United States*, 4 Cir., 107 F. 2d 885, 126 A. L. R. 1207; *United States v. Lecato*, 2 Cir., 29 F. 2d 694.”

See, also, *United States v. Domroe*, 2 Cir., 129 F. (2d) 675, 677-678, to the same effect.

Only Count I of the Information is before this Court. Count I of the Information charges that appellants

“* * * did knowingly, wilfully and unlawfully offer for sale, sell and deliver to E. E. Surhart at 501 Daisy Avenue, Long Beach, California, one side of U. S. Grade A beef weighing 296 pounds for the sum of \$88.91, which said side of U. S. Grade A beef

weighing 296 pounds had a maximum price of \$68.18 under the provisions of Revised Maximum Price Regulations 169 (7 Fed. Reg. 10381) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942; contrary to the form and effect of the statute in such case made and provided and against the peace and dignity of the United States of America (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942)." [R. 4.]

Pending trial of the case below and pursuant to an understanding and agreement with Government Counsel and the Probation Officer of the District Court, appellants withdrew their pleas of not guilty and entered pleas of guilty to Counts I and III of the Information. But the trial court disregarded said understanding and agreement, and rendered the judgments which have been appealed to this Court.

Jurisdiction.

The judgments of the District Court were entered on August 30, 1943. Thereafter, on August 31, 1943, appellants filed their motions

"* * * for an order vacating judgments, setting aside sentences, granting defendants the right to withdraw their pleas of guilty and to re-enter their pleas of not guilty, and for a new trial." [R. 64.]

This motion was heard and denied by the trial court on September 2, 1943. [R. 80-106.] Thereafter, on Septem-

ber 3, 1943, appellants filed their respective notices of appeal to this Court. [R. 22-31.]

The jurisdiction of this Court is invoked under Section 128 of the Judicial Code, as amended (Section 225(a) of Title 28, U. S. C. A.), and under Rule III, Rules of Practice and Procedure in Criminal Cases (18 U. S. C. A. following Section 688), 292 U. S. 661, 78 L. Ed. 1512, 1513, 54 S. Ct. XXXVII.

Statutes and Regulations Involved.

The case involves the Emergency Price Control Act of 1942 (Act of January 20, 1942, 56 Stat. 23, 50 U. S. C. A., Appendix Supp. II, Sec. 901 *et seq.*), as amended by the Act of October 2, 1942 (56 Stat. 765, 50 U. S. C. A., Appendix Supp. II, Sec. 961 *et seq.*), and Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381), purporting to be issued thereunder on December 10, 1942.

Copies of the Emergency Price Control Act and the Act of October 2, 1942, and copy of Revised Maximum Price Regulation No. 169, or pertinent excerpts therefrom, are set forth in the Appendix hereto, or furnished separately to this Court, as requested at the hearing.

Specification of Errors.

The errors assigned [R. 115-119] are summarized in Appellants' Opening Brief, pages 2, 3, to which reference is made.

ARGUMENT.

I.

Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381), if Otherwise Valid and Effective, Does Not Cover and Is Without Application to the Offense Charged in Count I of the Information.

The offense charged in Count I of the Information is the alleged unlawful sale and delivery by appellants of a side of beef to one E. E. Surhart at a price in excess of the price fixed by Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381). If said Regulation is otherwise valid and effective (which is denied), appellants assert it does not cover and is not applicable to the sale of a side of beef.

A.

A side of beef is a "beef carcass" and a "beef carcass" is an agricultural commodity; and Revised Maximum Price Regulation No. 169 is not applicable to an agricultural commodity, since said Regulation was not approved by the Secretary of Agriculture, or by the War Food Administrator.

"Beef carcass" is defined in Section 1364.455(a) (8) of Revised Maximum Price Regulation No. 169 as follows:

" 'Beef carcass' means and is limited to the dressed carcass, side, or sides of beef, which shall be dressed with the 1st and 2nd tail (caudal) vertebrae, kidney knob or knobs and hanging tender left on. The beef carcass shall not be broken in any other manner than provided in paragraph (a) (9) of this sec. 1364.455."

Paragraph (a) (9), referred to in Section 1364.455(a) (8), defines "Beef wholesale cut" as follows:

"'Beef wholesale cut' means and is limited to any of the following cuts meeting the following minimum specifications, derived from the beef carcass, but excluding the offal and any item not included herein. (All measurements prescribed herein shall be made with a rigid straight ruler. All cuts shall be made according to the definite guides and measurements specified. Ribs are designated as 1st to 13th, inclusive, counting as the 1st rib that one which is nearest the neck end of the side.)"

These definitions show clearly enough that a side of beef is not a "processed product" as argued by the Government. But, the definition of "Processed products" in Section 1364.477(3) of Revised Maximum Price Regulation No. 169 is conclusive. It is there defined as follows:

"Sec. 1364.477. *Definitions applicable to processed products.* (a) When used in this Revised Maximum Price Regulation No. 169 and when applicable to processed products the term: * * *

"(3) 'Processed Products' means ground, cured, pickled, spiced, smoked, dried or otherwise processed beef and/or veal, including ground hamburger and sausage containing any proportion of beef or veal: *Provided*, That any beef carcass, or cut thereof, including any beef wholesale cut which has been boned as permitted in subpart B of this Revised Regulation or otherwise, or any veal carcass, or cut thereof, including any veal wholesale cut which has been boned as permitted in subpart C of this Revised Regulation or otherwise shall not be deemed a processed product. Products of each grade and brand, and in each stage of processing, shall be considered separate processed

products. Each type of canned and packaged meat, made entirely from beef and/or veal shall be considered a separate processed product. Kosher processed products shall for the purposes of Sec. 1364.476 be regarded as separate processed products.”

Under the foregoing definitions it is manifest that a side of beef is not a “processed product” as claimed by the Government in its brief (pp. 16, 17). Moreover, these definitions find ample support in Court decisions.

See

Commonwealth v. Clark, 344 Pa. 155, 25 Atl. (2d) 143;

Florida Packing & Ice Co. v. Carney, 51 Fla. 190, 41 So. 190, 192;

Kennedy v. State Board, 224 Iowa 405, 276 N. W. 205, 206. (App. Rep. Br. pp. 24-27.)

The Government’s argument rests upon the theory that a side of beef is a processed product from an agricultural commodity, and that therefore it is covered by Revised Maximum Price Regulation No. 169. If this theory is incorrect—if, as is apparent from the foregoing definitions, a side of beef is not a processed product but is an unprocessed carcass of livestock—then said Regulation No. 169 is not and cannot be applicable to the offense charged in Count I of the Information. This is virtually conceded in the Government’s brief. It is there said at page 17:

“* * * the two regulations here involved (Nos. 169 and 148) do not cover ‘agricultural commodities,’ they only embrace *processed* meats.” (Italics the Government’s.)

And the Government then argues

“Since the regulation covers commodities processed from agricultural commodities rather than the agricultural commodities themselves, and since Sec. 3 of the Act treats agricultural commodities and commodities processed from agricultural commodities separately (see particularly Sec. 3(c)), it is clear that the Act did not require approval by the Secretary of Agriculture.” (*Id.* p. 17.)

But the Government’s premise upon which its conclusion rests is unsound under the definitions of Maximum Price Regulation No. 169, *supra*, and therefore its conclusion is equally unsound.

Moreover, the Government concedes that Section 3(e) of the Emergency Price Control Act requires the approval of the Secretary of Agriculture before the Price Administrator can take any action with respect to the regulation of prices of agricultural commodities. (See App. Br. p. 17.) This is also conceded in the opinion of the District Court in *United States v. Charney*, 50 Fed. Supp. 581, cited in the Government’s brief (p. 17) where it is said:

“Sec. 3(e) of the Act requires the approval of the Secretary of Agriculture before any action is taken with respect to any ‘agricultural commodities.’”

Section 3(e) of the Emergency Price Control Act of 1942, as amended (Title 50, U. S. C. A. App., Section 903(e)), referred to, provides:

“Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be

necessary under Section 202 and Section 205(a) and (b) to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.”

The exceptions arising out of Sections 202 and 205(a) and (b), mentioned *supra*, have no bearing upon and are not pertinent to the matters under discussion.

Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381) shows on its face that it was not approved by the Secretary of Agriculture, or by the War Food Administrator. Therefore, under the provisions of the Act, and especially under the provisions of Section 3(e) thereof (50 U. S. C. A. App. Section 903(e)) and the definitions prescribed by Section 1364.455(a) (8) and (9) and by Section 1364.477(a) (3) of Revised Maximum Price Regulation No. 169, *supra*, the Act and Regulation did not cover and were not applicable to the sale of a side of beef which is an agricultural commodity. The sale mentioned and described in Count I of the Information did not violate any of the effective provisions of the Act or Regulation and therefore was not an offense against the laws of the United States.

B.

Section 204(d) of the Act does not preclude appellants from raising the question that Revised Maximum Price Regulation No. 169 does not cover and is without application to the offense charged in Count I of the Information.

In their Opening Brief (pp. 6-8) appellants asserted that Revised Maximum Price Regulations Nos. 169 and 148 never became effective because the same were not approved by the Secretary of Agriculture. The point is

further discussed and elaborated in Appellants' Reply Brief (pp. 24-27). That Regulation No. 169 never became effective with respect to an agricultural commodity, such as the side of beef mentioned in Count I of the Information, has been fully established. Nor is it necessary in this connection to question generally the validity of said Regulation No. 169. It is sufficient to point out the fact that, because the Regulation was not approved by the Secretary of Agriculture, it did not become effective as to agricultural commodities. Otherwise expressed, as to that purpose the Regulation simply did not come into existence. It is analogous to a bill introduced in Congress, which is passed or approved by the House but never approved by the Senate. The bill does not become law under such circumstances.

The Government's argument (its Brief pp. 9-17) that Section 204(d) precludes consideration of the question whether Regulation No. 169 is valid cannot apply to consideration of the effectiveness of the Regulation because it never came into existence as to agricultural commodities.

Nor does the recent decision of the Supreme Court of the United States (March 27, 1944) in Cases Nos. 374 and 375—*Yakus v. United States* and *Rottenberg v. United States* (12 United States Law Week, p. 4262 *et seq.*)—affect the question here under discussion.

In the *Yakus* and *Rottenberg Cases* the majority of the Supreme Court held (1) that the Emergency Price Control Act does not invalidly delegate legislative power to the Price Administrator; (2) that Section 204(d) of the

Act is intended to preclude consideration by the District Court of the *validity* of a price regulation as a defense to a criminal prosecution for violation of the Act; and (3) that the procedure provided in the Act for administrative and judicial review of Regulations is exclusive and sufficient to meet the demands of due process. Significantly, in this connection the Supreme Court said (12 United States Law Week, p. 4268) :

“We have no occasion to decide whether one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face.”

Thus that question is left open for future decision by the Court.

Whether or not Regulation No. 169 is unconstitutional and void on its face is not now an issue in this case. The issue here is, whether the Regulation became effective as to agricultural commodities. If it did not become effective as to such commodities, then the offense charged in Count I of the Information is not a violation of the Act or the Regulation and appellants have committed no crime against the laws of the United States.

That Revised Maximum Price Regulation No. 169 never became effective as to agricultural commodities cannot be doubted and, moreover, is admitted in Appellee's Brief (pp. 16-17). It is respectfully submitted that no crime was charged in Count I of the Information, and therefore the judgments based thereon should be reversed.

II.

The Trial Court Abused Its Discretion in Refusing to Vacate Judgments and Sentences and Permit Defendants to Withdraw Pleas of Guilty and Re-enter Pleas of Not Guilty, and in Refusing a New Trial.

The record shows that appellants would not have withdrawn their pleas of not guilty to all counts of the Information and would not have entered pleas of guilty to Counts I and III thereof, but for the understanding and agreement reached with Counsel for the Government and the Probation Officer of the District Court. [R. 61-62.] The record also shows that appellants were sentenced for crimes not charged against them in the Information and to which they did not plead guilty. These facts were brought to the attention of the trial court at the hearing of appellants' motion to vacate judgments and sentences and permit defendants to withdraw pleas of guilty and re-enter pleas of not guilty, and for a new trial. Under these facts it was an abuse of discretion for the trial court to deny appellants' motion.

A.

Appellants are entitled to raise this question on appeal. The order denying motion to vacate judgments and sentences and for a new trial is final and appealable, and has been appealed from. This Court has jurisdiction to hear this appeal. (See Sec. 128 of the Judicial Code (28 U. S. C. A., Sec. 225(a).) See, also, Rule III, Rules of Practice and Procedure in Criminal Cases (18 U. S. C. A. following Sec. 688), 292 U. S. 661, 78 L. Ed. 1512 *et seq.*, 54 S. Ct. XXXVII.)

Rule II(4) of Rules of Practice and Procedure in Criminal Cases (28 U. S. C. A. following Sec. 723a) does

not preclude this Court from reviewing the abuse of discretion committed by the trial court in denying appellants' motion to vacate judgments and sentences and grant a new trial, under the facts shown by the record.

Camarota v. United States (3d Cir.), 2 F. (2d) 650;

Moody v. Riechow, 38 Wash. 303, 80 Pac. 461, 462;

United States v. Fox (3d Cir.), 130 F. (2d) 50;

Kercheval v. United States, 274 U. S. 220, 71 L. Ed. 1009;

Paris v. United States (4th Cir.), 137 F. (2d) 300;

Clemons v. United States (4th Cir.), 137 F. (2d) 302.

Judicial discretion is not completely unfettered, but must be exercised within such boundaries as will observe the spirit of the law and do justice. As was said in *Camarota v. United States*, 2 F. (2d) 650, at page 651:

“In imposing sentences much latitude is accorded trial courts, and with sentences imposed within the terms of the statutes, appellate courts have little or nothing to do. Therefore, we are not concerned with the sentence which the court imposed upon Camarota in this case. We are concerned with its refusal, in the circumstances, to allow him to withdraw his plea of guilty to the third count, enter a plea of not guilty and go to trial.

“Concededly, an application of this kind is addressed to the discretion of the trial court. Here again the law allows much latitude. But such discretion, as was early said by Lord Mansfield in the Case of John Wilkes, 4 Burr. pt. IV, 2539, ‘means sound discretion guided by law. It must be governed by

rule, not by humour; it must not be arbitrary, vague, and fanciful, but legal and regular.' Adhering to the same concept, later courts have held that judicial discretion must 'be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of substantial justice.' *Moody v. Riechow*, 38 Wash. 303, 80 P. 461, 462. 'It is of the essence of justice not to decide against anyone on grounds which are not charged against him, and as to which he has not had an opportunity of offering explanations or calling evidence.' *O'Rorke v. Bolingbroke*, L. R. 2 App. Cas. 834."

In the case at bar, the trial court should have taken into consideration the fact that defendants' pleas of guilty were entered as the result of the understanding and agreement between respective counsel and the Probation Officer of the District Court that only small fines and no imprisonment whatever would be recommended to the Court.

B.

Counsel for the Government and the Probation Officer of the District Court did not observe and keep their understanding and agreement with defendants. This is clearly apparent from the record.

The understanding and agreement mentioned was in substance that appellants withdraw their pleas of not guilty to all six counts of the Information, enter pleas of guilty to Counts I and III thereof, and that each defendant be fined \$125.00 on each of Counts I and III—a total for both defendants of \$500.00—and that Counts II, IV, V and VI of the Information be dismissed.

Facts Shown by the Record.

In the Affidavit of John W. Preston filed in support of the Motion to Vacate Judgments and Sentences, etc., the following statements appear concerning said understanding and agreement:

“After talking with Mr. Johnson, your affiant then recontacted Mr. Kinnison and informed him of the statements made by Mr. Johnson. Affiant then asked Mr. Kinnison what he thought of a fine of \$125.00 on each count, making a total of \$500.00, with no imprisonment, if the defendants should enter pleas of guilty to the two counts. Mr. Kinnison responded that he thought that was just about the correct judgment that should be entered.

“Affiant then asked Mr. Kinnison if he would recommend in open court such a disposition of the case. He responded that he did not feel free to mention figures to the Court and would not do so unless the Court requested a recommendation from him, but he volunteered then and there to say that he could talk about the disposition of the cause and the amount of the fines to the probation officer and that the probation officer, in turn, was privileged to make, and would make, recommendations, including the amount of the fines, to the Court. He likewise promised to talk to the probation officer and ascertain from him if he would make a recommendation in the manner and amounts above set forth.

“Affiant waited a day or two and again asked Mr. Kinnison if he had talked to the probation officer about this recommendation. Mr. Kinnison replied that he had and that the probation officer said that he would make such recommendations to the Court with the sole proviso that the records of the defendants should be free from prior convictions.

“Affiant, knowing that no prior convictions had been had, related these facts substantially as stated to defendants and upon this assurance they consented, upon affiant’s recommendation, to withdraw their pleas of not guilty and to enter pleas of guilty to counts one and three of the information.” [R. 67-68.]

The statements in said Affidavit just quoted are in all essential respects confirmed by the Affidavit of Ray H. Kinnison, Assistant United States Attorney, as follows:

“Thereafter, on the same day, your affiant talked to Mr. Meader, of the probation department, giving him the facts of the case and stating that Mr. Preston had suggested the amount of Five Hundred (\$500.00) Dollars as being a reasonable amount to fine the defendants. Mr. Meader stated that upon the facts stated, if the defendants had no prior record, ‘and all other things being equal,’ the probation office would undoubtedly recommend a ‘moderate fine.’ Thereafter, on the same day, your affiant called Mr. Preston on the telephone and repeated to him the statements made by Mr. Meader. Arrangements were then made to advance the case upon the calendar for defendants to change their plea.” [R. 78.]

In this connection John W. Preston testified at the hearing of the Motion to Vacate Judgments and Sentences as follows:

“Q. I mean, what was your understanding, if I may interrupt, with Mr. Kinnison? A. That is what I am leading to. After talking the matter over and investigating it, I called on Mr. Kinnison, over the telephone, I think, first, and I don’t remember the date—probably about the 5th or 6th of August—and he told me that he had made a proposition to Mr. Mirman, my associate here, whereby a plea of guilty

to two counts might be entered, and the remaining counts dismissed, but on thinking it over he thought that would be satisfactory to him, but he didn't want to take that stand without the consent of the legal staff of the OPA, and anything they agreed to would be all right. And I asked him what sentences had been meted out in similar cases, and he said the highest one he knew of was a fine levied by Judge Beaumont of \$250.00. I then, acting on his offer, went to see Mr. Johnson, of the OPA staff, and talked at length with him about it, and he told me that a plea on two counts would be satisfactory to him. And I told him I was going to report that to Mr. Kinnison. And I asked him which counts, and he said No. 1 and I asked him which after that, and he said any other one, that it didn't make any difference to them. I then relayed this information to Mr. Kinniston, and asked him what he thought of \$125.00 as the maximum fine on each count, and he said, 'That is, in my opinion, just right.'

Q. He did state to you that it was his opinion?

A. He did, yes, in his judgment, it was just right. And I then asked him if he would make such a recommendation to the Court, and he said, 'You know Judge Harrison. You can't make recommendations in his Court, and I can't do it unless he asks me.' I said to him, 'It is sometimes done, even in Judge Harrison's Court,' and he said, 'I can do this,' he says, 'I can talk to the Probation Officer, and,' he says, 'he can talk to the Judge and make recommendations.' I said, 'Well, you can talk with the Probation Officer and see if he will make this recommendation,' and he said he would. And he either called me or I called him, and I asked him what the Probation Officer said, and he said the Probation Officer was agreeable to it, and he would do it unless, on investi-

gation, he found that there was a previous conviction against the defendants. And I told him I didn't fear that at all. And that was the understanding." [R. 83-84.]

"Q. Now, Judge, with those facts in mind, you advised your clients, did you not, to plead guilty in this case? A. I did. I consulted with them, and I said, 'You have got a 50-50 chance to beat this case, but,' I said, 'the OPA has put the law under attack, but I think they will straighten this out, and I don't believe we will make a fight on the law or regulations.' And I said, 'I have talked it over with the United States Attorney's office and the Probation Officer has agreed to recommend a fine of not to exceed \$125.00 on each count, and I recommend that you change your plea on that ground.'

Q. Didn't you just say that Mr. Kinnison said he could not recommend the fine? A. He said just what I said, exactly.

The Court: You also advised your clients that sentence would be imposed, and that that was a matter that was up to the Court? A. I told them that the Court would not have to live up to it, but I knew then, as I know now, that the defendants would have the right to change their pleas, if this was not lived up to. I had been through that, and I knew that." [R. 86.]

In view of the foregoing statements from the Affidavits and testimony in this case there can be no question as to the existence of an understanding and agreement between appellants' counsel on the one hand and Government counsel and the Probation Officer of the trial court on the other, or that said understanding and agreement was other than as above stated. It was upon this understand-

ing and agreement that appellants agreed to withdraw their pleas of not guilty and enter pleas of guilty.

Instead of respecting the agreement, however, the Probation Officer reported and recommended to the trial court as follows:

“SUMMARY:

“Investigation has shown that Aaron Rosensweig and Abe Rosensweig were violating price ceiling according to a well-planned scheme. Their invoices of maximum prices and checks received from buyers show similar amounts. However, they accepted further cash payment on the side. OPA investigation indicates that thousands of dollars overcharge was probably made by this method.

“RECOMMENDATION:

“Because of the clear past record of these defendants, penitentiary sentence is not recommended. It is recommended that they be given a heavy fine and placed on probation.” [R. 79.]

C.

(1) In view of the facts disclosed by the record, *supra*, there can be no doubt that the agreement that induced withdrawal of pleas of not guilty and entry of pleas of guilty was not respected by the Probation Officer or Counsel for the Government. In such circumstances the trial court should, in a spirit of fairness and justice, have vacated the judgments and sentences and granted a new trial. To refuse to do so was an abuse of discretion. Appellants' motion was broad enough to justify the granting of that relief without regard to the withdrawal of pleas of guilty and re-entry of pleas of not guilty, and it is beside the point for the Government to argue that Rule II(4) of Rules of Practice and Procedure in Criminal

Cases precludes such relief. Appellants' motion, treated solely as a motion to vacate judgments and sentences and for a new trial, cannot be thus summarily denied because of said Rule II(4). The motion was addressed to the sound discretion of the Court, and the Court was not precluded from vacating judgments and sentences and from granting a new trial because of Rule II(4). Moreover, appellants insist the Court could and should have permitted withdrawal of pleas of guilty and re-entry of pleas of not guilty under the authority of *Robinson v. Johnston* (9th Cir.), 118 F. (2d) 998, 1000, and other cases cited in Appellants' Reply Brief, pages 32-38. In any event, however, the motion, in so far as it sought to vacate judgments and sentences and grant a new trial, should have been sustained.

(2) The Probation Officer and United States Attorney insisted upon and the Court rendered judgment against defendants for crimes not embraced in their pleas of guilty.

The report of the Probation Officer says:

"OPA investigation *indicates* that thousands of dollars overcharge was *probably* made by this method." (Italics ours.)

Assuming, *arguendo*, that the statement is true, the overcharge alleged in Count I of the Information was the only one before the Court and that amounted to \$20.73. The OPA investigation must, therefore, have referred to other supposed violations by defendants. Moreover, the alleged investigation by OPA only "indicates" that de-

defendants "probably" made other overcharges. In this connection, the Assistant United States Attorney, prior to judgment, made the following statements to the Court:

"The Court: What is the position of the Government?

Mr. Kinnison: The position of the Government is, I believe, more or less like in the report of the Probation Officer. The only matter is, I might somewhat question the size of the defendants' business, for the reason that the information on our file indicates a business greatly in excess of that mentioned by Judge Preston.

Mr. Preston: That is what I am told. Am I correct?

The Defendant: Yes.

Mr. Kinnison: There is evidence in the file of payments made by one of the defendants of \$7,060.00 bank deposit in one day. That would lead me to believe their business is somewhat larger than represented. I have no definite information.

Mr. Preston: What I referred to was beef, Your Honor. There may be some other livestock which would make it greater.

Mr. Kinnison: I think we should have a true picture before the Court." [R. 59-60.]

The judgment of the trial court obviously rested in large part upon statements by the Probation Officer and Assistant United States Attorney concerning matters irrelevant to the offense charged in the Information, and these statements were in violation of the agreement. In other words, defendants were convicted and given sentences for offenses for which they were not on trial and which were not proven by any competent evidence.

Before rendering judgment the trial court made the following statement:

“The Court: The offense to which they have pleaded is a deliberate, planned offense. It may be true that the regulations of the OPA made it difficult for them to operate, but take the situation of the father; he came to this country, was naturalized, raised his family here, and prospered here. Those opportunities were furnished to him by our form of Government, and are the opportunities which are accorded to everyone. When it came down to the test, when this country is fighting for its life, not only on the battle front, but on the home front, these people who owe so much to this country, have violated our laws.

“I have heretofore described this class of offense as secondary sabotage, and that is the way I feel about it now. I haven’t any sympathy for these defendants, as I stated before, because their offense was deliberate, and it was motivated by the profit they desired to make at a time when our Government is striving to maintain price levels. I realize these price levels at times work a definite hardship on people, but this Court is not inclined to take these offenses lightly, and unfortunately, people who violate these price ceilings are not deterred by fines.” [R. 60.]

The statements of respective Counsel and of the Court show that the Court’s judgment and the severity of the sentences imposed were due to the failure of Government Counsel and the Probation Officer to live up to the understanding and agreement. Appellants were, in fact, given sentences which were based upon the report and recommendation of the Probation Officer, acquiesced in by the Assistant United States Attorney in open court, which

appellants had no opportunity to rebut or explain. In short, if the judgment is not reversed, appellants will be punished for offenses not charged against them and to which they did not plead guilty.

Under such circumstances, the cases cited in Appellants' Opening Brief, pages 19-23, and in their Reply Brief, pages 32-38, are directly in point, and, we respectfully submit, should be followed. See:

United States v. Fox, 130 F. (2d) 56, 59;

Kercheval v. United States, 274 U. S. 220, 71 L. Ed. 1009;

United States v. Woody, 2 F. (2d) 262;

Deutsch v. Aderhold, 80 F. (2d) 677, 678;

Paris v. United States, 137 F. (2d) 300;

Clemons v. United States, 137 F. (2d) 302;

People v. Schwarz, 201 Cal. 309.

Conclusion.

Wherefore, appellants respectfully submit that the judgment of the trial court should be reversed and a new trial be granted.

Respectfully submitted,

JOHN W. PRESTON and
SAMUEL MIRMAN,

By JOHN W. PRESTON,

Attorneys for Appellants.

APPENDIX.

Emergency Price Control Act of 1942.

Three printed copies of the Act have been furnished appellants by the District Enforcement Attorney of Price Administration and the same are permanently attached hereto for use by the Court. In addition thereto Sections 1, 2(a) (c) (d) (g) (h), 4(a), 201(d), 203(a) (b) (c), 204(a) (b) (c) (d), 205(b), (c), 301, 302(a) (b) (c) (i) and 305 appear at pages 1 to 13 of the Appendix to Appellee's Brief.

For the convenience of the Court, Section 3 of the Act is set out in full as follows:

"Sec. 3. (a) No maximum price shall be established or maintained for any agricultural commodity below the highest of any of the following prices, as determined and published by the Secretary of Agriculture: (1) 110 per centum of the parity price for such commodity, adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials, or, in case a comparable price has been determined for such commodity under subsection (b), 110 per centum of such comparable price, adjusted in the same manner, in lieu of 110 per centum of the parity price so adjusted; (2) the market price prevailing for such commodity on October 1, 1941; (3) the market price prevailing for such commodity on December 15, 1941; or (4) the average price for such commodity during the period July 1, 1919, to June 30, 1929.

(b) For the purposes of this Act, parity prices shall be determined and published by the Secretary of Agriculture as authorized by law. In the case of any agricultural commodity other than the basic crops

corn, wheat, cotton, rice, tobacco, and peanuts, the Secretary shall determine and publish a comparable price whenever he finds, after investigation and public hearing, that the production and consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for basic commodities.

(c) No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a).

(d) Nothing contained in this Act shall be construed to modify, repeal, supersede, or affect the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, or to invalidate any marketing agreement, license, or order, or any provision thereof or amendment thereto, heretofore or hereafter made or issued under the provisions of such Act.

(e) Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 and section 205 (a) and (b) to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.

(f) No provision of this Act or of any existing law shall be construed to authorize any action contrary to the provisions and purposes of this section."

Inflation Control Act of 1942.

Sections 961 to 971, both inclusive, of Title 50, U. S. C. A. Appendix, constituting the Inflation Control Act of 1942, appear in full at pages 14-22 of the Appendix to Appellee's Brief.

Revised Maximum Price Regulation No. 169.

The District Attorney for the Office of Price Administration has furnished appellants with three printed copies of Revised Maximum Price Regulation No. 169 issued by Chester Bowles, Administrator, on January 28, 1944, and the same are separately submitted to the Court and are not attached hereto because of the size and bulk thereof. As stated by the District Enforcement Attorney for OPA in his accompanying letter "it should be noted however that RMPR 169 includes amendments up to January 28, 1944 and RMPR 148 includes amendments to February 18, 1944."

Section 1364.455(a) (8) and (9) has been compared and found to be identical with said section as effective at the time of the date of the alleged violation thereof set forth in the Information. Section 1364.477 (3) has been compared but differs somewhat from said section as effective at the date of the alleged violations thereof.

For the convenience of the Court, Sec. 1364.455(a) (8) and (9) and Sec. 1364.477 (3) as effective at the dates of the alleged violations thereof are herewith submitted *in haec verba* as follows:

"Sec. 1364.455. *Definitions applicable to beef.* (a) When used in this Revised Maximum Price Regulation No. 169 and when applicable to beef, the term: (Subsections (1) to (7) omitted.)

“(8) ‘Beef carcass’ means and is limited to the dressed carcass, side, or sides of beef, which shall be dressed with the 1st and 2nd tail (caudal) vertebrae, kidney knob or knobs and hanging tender left on. The beef carcass shall not be broken in any other manner than provided in paragraph (a) (9) of this Sec. 1364.455.

“(9) ‘Beef wholesale cut’ means and is limited to any of the following cuts meeting the following minimum specifications, derived from the beef carcass, but excluding the offal and any item not included herein. (All measurements prescribed herein shall be made with a rigid straight ruler. All cuts shall be made according to the definite guides and measurements specified. Ribs are designated as 1st to 13th, inclusive, counting as the 1st rib that one which is nearest the neck end of the side.)

“Sec. 1364.477. *Definitions applicable to processed products.* (a) When used in this Revised Maximum Price Regulation No. 169 and when applicable to processed products the term: (Subsections (1) and (2) omitted.)

“(3) ‘Processed products’ means ground, cured, pickled, spiced, smoked, dried or otherwise processed beef and/or veal, including ground hamburger and sausage containing any proportion of beef or veal: *Provided*, That any beef carcass, or cut thereof, including any beef wholesale cut which has been boned as permitted in subpart B of this Revised Regulation or otherwise, or any veal carcass, or cut thereof, including any veal wholesale cut which has been boned as permitted in subpart C of this Revised Regulation or otherwise shall not be deemed a processed product. Products of each grade and brand, and in each stage of processing, shall be considered separate processed

products. Each type of canned and packaged meat, made entirely from beef and/or veal shall be considered a separate processed product. Kosher processed products shall for the purposes of Sec. 1364.476 be regarded as separate processed products.”

NOTE: It has been impossible to obtain and furnish copies of Revised Maximum Price Regulation No. 169 *in haec verba* effective as of the date of the offenses charged in the Information.

Revised Maximum Price Regulation No. 148.

Three printed copies of Revised Maximum Price Regulation No. 148 issued by Chester Bowles, Administrator, on February 18, 1944, are submitted to the Court separately because the size and bulk thereof preclude attaching the same hereto.

“It should be noted, however, that * * * RMPR 148 includes amendments to February 18, 1944.” (Accompanying letter, H. Eugene Breitenbach, District Enforcement Attorney for OPA.)

NOTE: It has been impossible to obtain and furnish copies of Revised Maximum Price Regulation No. 148 *in haec verba* effective as of the date of the offenses charged in the Information.

EMERGENCY PRICE CONTROL ACT OF 1942

[PUBLIC LAW 421—77TH CONGRESS]

[CHAPTER 26—2D SESSION]

[H. R. 5990]

AN ACT

To further the national defense and security by checking speculative and excessive price rises, price dislocations, and inflationary tendencies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—GENERAL PROVISIONS AND AUTHORITY

PURPOSES; TIME LIMIT; APPLICABILITY

SECTION 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

(b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1943, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations,

orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

(c) The provisions of this Act shall be applicable to the United States, its Territories and possessions, and the District of Columbia.

PRICES, RENTS, AND MARKET AND RENTING PRACTICES

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to

the Administrator as it deems advisable. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

(b) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area.

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.

(d) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices (including practices relating to changes in form or quality) or hoarding, in connection with any commodity, and speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations, which in his judgment are equivalent to or are likely to result in price or rent increases, as the case may be, inconsistent with the purposes of this Act.

(e) Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: *Provided*, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator, with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d; except that in the case of the sale of any commodity by any such corporation, the sale price therefor shall not exceed any maximum price established pursuant to subsection (a) of this section which is applicable to such commodity at the time of sale or delivery, but such sale price may be below such maximum price or below the purchase price of such commodity, and the Administrator may make recommendations with respect to the buying or selling, or storage or use, of any such commodity. In any case in which a commodity is domestically produced, the powers granted to the Administrator by this subsection shall be exercised with respect to importations of such commodity only to the extent that, in the judgment of the Administrator, the domestic production of the commodity is not sufficient to satisfy the demand therefor. Nothing in this section shall be construed to modify, suspend, amend, or supersede any provision of the Tariff Act of 1930, as amended, and nothing in this section, or in any existing law, shall be construed to authorize any sale or other disposition of any agricultural commodity contrary to the provisions of the Agricultural Adjustment Act of 1938, as amended, or to authorize the Administrator to prohibit trading in any agricultural commodity for future delivery if such trading is subject to the provisions of the Commodity Exchange Act, as amended.

(f) No power conferred by this section shall be construed to authorize any action contrary to the provisions and purposes of section 3, and no agricultural commodity shall be sold within the United States pursuant to the provisions of this section by any governmental agency at a price below the price limitations imposed by section 3 (a) of this Act with respect to such commodity.

(g) Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

(h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.

(i) No maximum price shall be established for any fishery commodity below the average price of such commodity in the year 1941.

AGRICULTURAL COMMODITIES

SEC. 3. (a) No maximum price shall be established or maintained for any agricultural commodity below the highest of any of the following prices, as determined and published by the Secretary of Agriculture: (1) 110 per centum of the parity price for such commodity, adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials, or, in case a comparable price has been determined for such commodity under subsection (b), 110 per centum of such comparable price, adjusted in the same manner, in lieu of 110 per centum of the parity price so adjusted; (2) the market price prevailing for such commodity on October 1, 1941; (3) the market price prevailing for such commodity on December 15, 1941; or (4) the average price for such commodity during the period July 1, 1919, to June 30, 1929.

(b) For the purposes of this Act, parity prices shall be determined and published by the Secretary of Agriculture as authorized by law. In the case of any agricultural commodity other than the basic crops corn, wheat, cotton, rice, tobacco, and peanuts, the Secretary shall determine and publish a comparable price whenever he finds, after investigation and public hearing, that the production and consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for basic commodities.

(c) No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a).

(d) Nothing contained in this Act shall be construed to modify, repeal, supersede, or affect the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, or to invalidate any marketing agreement, license, or order, or any provision thereof or amendment thereto, heretofore or hereafter made or issued under the provisions of such Act.

(e) Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 and section 205 (a) and (b) to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.

(f) No provision of this Act or of any existing law shall be construed to authorize any action contrary to the provisions and purposes of this section.

PROHIBITIONS

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

(b) It shall be unlawful for any person to remove or attempt to remove from any defense-area housing accommodations the tenant or occupant thereof or to refuse to renew the lease or agreement for the use of such accommodations, because such tenant or occupant has taken, or proposes to take, action authorized or required by this Act or any regulation, order, or requirement thereunder.

(c) It shall be unlawful for any officer or employee of the Government, or for any adviser or consultant to the Administrator in his official capacity, to disclose, otherwise than in the course of official duty, any information obtained under this Act, or to use any such information, for personal benefit.

(d) Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent.

VOLUNTARY AGREEMENTS

SEC. 5. In carrying out the provisions of this Act, the Administrator is authorized to confer with producers, processors, manufacturers, retailers, wholesalers, and other groups having to do with commodities, and with representatives and associations thereof, to cooperate with any agency or person, and to enter into voluntary arrangements or agreements with any such persons, groups, or associations relating to the fixing of maximum prices, the issuance of other regulations or orders, or the other purposes of this Act, but no such arrangement or agreement shall modify any regulation, order, or price schedule previously issued which is effective in accordance with the provisions of section 2 or section 206. The Attorney General shall be promptly furnished with a copy of each such arrangement or agreement.

TITLE II—ADMINISTRATION AND ENFORCEMENT

ADMINISTRATION

SEC. 201. (a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of \$12,000 per annum. The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may utilize the services of Federal, State, and local agencies and may utilize and establish such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any case in any court. In the appointment, selection, classification, and promotion of officers and employees of the Office of Price Administration, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(b) The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place. The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities, and to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the Government with respect to any particular commodity or commodities; but, notwithstanding any provision of this or any other law, no powers or functions conferred by law upon the Secretary of Agriculture shall be transferred to the Office of Price Administration or to the Administrator, and no powers or functions conferred by law upon any other department or agency of the Government with respect to any agricultural commodity, except powers and functions relating to priorities or rationing, shall be so transferred.

(c) The Administrator shall have authority to make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere; for lawbooks and books of reference; and for paper, printing, and binding) as he may deem necessary for the administration and enforcement of this Act. The provisions of section 3709 of the Revised Statutes shall not apply to the purchase of supplies and services by the Administrator where the aggregate amount involved does not exceed \$250.

(d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.

INVESTIGATIONS; RECORDS; REPORTS

SEC. 202. (a) The Administrator is authorized to make such studies and investigations and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpoena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpoena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

(e) In case of contumacy by, or refusal to obey a subpoena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

(f) Witnesses subpoenaed under this section shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States.

(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

(h) The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confi-

dential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the national defense and security.

PROCEDURE

SEC. 203. (a) Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

(b) In the administration of this Act the Administrator may take official notice of economic data and other facts, including facts found by him as a result of action taken under section 202.

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs.

REVIEW

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have

exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and

fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

ENFORCEMENT

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

(b) Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

(c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with

State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Except as provided in section 205 (f) (2), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the United States Government in any proceeding under this Act.

(d) No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid. In any suit or action wherein a party relies for ground of relief or defense upon this Act or any regulation, order, price schedule, requirement, or agreement thereunder, the court having jurisdiction of such suit or action shall certify such fact to the Administrator. The Administrator may intervene in any such suit or action.

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for \$50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.

(f) (1) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act and to assure compliance with and provide for the effective enforcement of any regulation or order issued or which may be issued under section 2, or of any price schedule effective in accordance with

the provisions of section 206, he may by regulation or order issue to or require of any person or persons subject to any regulation or order issued under section 2, or subject to any such price schedule, a license as a condition of selling any commodity or commodities with respect to which such regulation, order, or price schedule is applicable. It shall not be necessary for the Administrator to issue a separate license for each commodity or for each regulation, order, or price schedule with respect to which a license is required. No such license shall contain any provision which could not be prescribed by regulation, order, or requirement under section 2 or section 202: *Provided*, That no such license may be required as a condition of selling or distributing (except as waste or scrap) newspapers, periodicals, books, or other printed or written material, or motion pictures, or as a condition of selling radio time: *Provided further*, That no license may be required of any farmer as a condition of selling any agricultural commodity produced by him, and no license may be required of any fisherman as a condition of selling any fishery commodity caught or taken by him: *Provided further*, That in any case in which such a license is required of any person, the Administrator shall not have power to deny to such person a license to sell any commodity or commodities, unless such person already has such a license to sell such commodity or commodities, or unless there is in effect under paragraph (2) of this subsection with respect to such person an order of suspension of a previous license to the extent that such previous license authorized such person to sell such commodity or commodities.

(2) Whenever in the judgment of the Administrator a person has violated any of the provisions of a license issued under this subsection, or has violated any of the provisions of any regulation, order, or requirement under section 2 or section 202 (b), or any of the provisions of any price schedule effective in accordance with the provisions of section 206, which is applicable to such person, a warning notice shall be sent by registered mail to such person. If the Administrator has reason to believe that such person has again violated any of the provisions of such license, regulation, order, price schedule, or requirement after receipt of such warning notice, the Administrator may petition any State or Territorial court of competent jurisdiction, or a district court subject to the limitations hereinafter provided, for an order suspending the license of such person for any period of not more than twelve months. If any such court finds that such person has violated any of the provisions of such license, regulation, order, price schedule, or requirement after the receipt of the warning notice, such court shall issue an order suspending the license to the extent that it authorizes such person to sell the commodity or commodities in connection with which the violation occurred, or to the extent that it authorizes such person to sell any commodity or commodities with respect to which a regulation or order issued under section 2, or a price schedule effective in accordance with the provisions of section 206, is applicable; but no such suspension shall be for a period of more than twelve months. For the purposes of this subsection, any such proceedings for the suspension of a license may be brought in a district court if the licensee is doing business in more than one State, or if his gross sales exceed \$100,000 per annum. Within thirty days after the entry of the judgment or order of any

court either suspending a license, or dismissing or denying in whole or in part the Administrator's petition for suspension, an appeal may be taken from such judgment or order in like manner as an appeal may be taken in other cases from a judgment or order of a State, Territorial, or district court, as the case may be. Upon good cause shown, any such order of suspension may be stayed by the appropriate court or any judge thereof in accordance with the applicable practice; and upon written stipulation of the parties to the proceeding for suspension, approved by the trial court, any such order of suspension may be modified, and the license which has been suspended may be restored, upon such terms and conditions as such court shall find reasonable. Any such order of suspension shall be affirmed by the appropriate appellate court if, under the applicable rules of law, the evidence in the record supports a finding that there has been a violation of any provision of such license, regulation, order, price schedule, or requirement after receipt of such warning notice. No proceedings for suspension of a license, and no such suspension, shall confer any immunity from any other provision of this Act.

SAVING PROVISIONS

SEC. 206. Any price schedule establishing a maximum price or maximum prices, issued by the Administrator of the Office of Price Administration or the Administrator of the Office of Price Administration and Civilian Supply, prior to the date upon which the Administrator provided for by section 201 of this Act takes office, shall, from such date, have the same effect as if issued under section 2 of this Act until such price schedule is superseded by action taken pursuant to such section 2. Such price schedules shall be consistent with the standards contained in section 2 and the limitations contained in section 3 of this Act, and shall be subject to protest and review as provided in section 203 and section 204 of this Act. All such price schedules shall be reprinted in the Federal Register within ten days after the date upon which such Administrator takes office.

TITLE III—MISCELLANEOUS

QUARTERLY REPORT

SEC. 301. The Administrator from time to time, but not less frequently than once every ninety days, shall transmit to the Congress a report of operations under this Act. If the Senate or the House of Representatives is not in session, such reports shall be transmitted to the Secretary of the Senate, or the Clerk of the House of Representatives, as the case may be.

DEFINITIONS

SEC. 302. As used in this Act—

(a) The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms "sell", "selling", "seller", "buy", and "buyer", shall be construed accordingly.

(b) The term "price" means the consideration demanded or received in connection with the sale of a commodity.

(c) The term "commodity" means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services.

(d) The term "defense-rental area" means the District of Columbia and any area designated by the Administrator as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes of this Act.

(e) The term "defense-area housing accommodations" means housing accommodations within any defense-rental area.

(f) The term "housing accommodations" means any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes (including houses, apartments, hotels, rooming or boarding house accommodations, and other properties used for living or dwelling purposes) together with all privileges, services, furnishings, furniture, and facilities connected with the use or occupancy of such property.

(g) The term "rent" means the consideration demanded or received in connection with the use or occupancy or the transfer of a lease of any housing accommodations.

(h) The term "person" includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing: *Provided*, That no punishment provided by this Act shall apply to the United States, or to any such government, political subdivision, or agency.

(i) The term "maximum price", as applied to prices of commodities means the maximum lawful price for such commodities, and the term "maximum rent" means the maximum lawful rent for the use of defense-area housing accommodations. Maximum prices and maximum rents may be formulated, as the case may be, in terms of prices, rents, margins, commissions, fees, and other charges, and allowances.

(j) The term "documents" includes records, books, accounts, correspondence, memoranda, and other documents, and drafts and copies of any of the foregoing.

(k) The term "district court" means any district court of the United States, and the United States Court for any Territory or other place subject to the jurisdiction of the United States; and the term "circuit courts of appeals" includes the United States Court of Appeals for the District of Columbia.

SEPARABILITY

SEC. 303. If any provision of this Act or the application of such provision to any person or circumstances shall be held invalid, the validity of the remainder of the Act and the applicability of such provision to other persons or circumstances shall not be affected thereby.

APPROPRIATIONS AUTHORIZED

SEC. 304. There are authorized to be appropriated such sums as may be necessary or proper to carry out the provisions and purposes of this Act.

APPLICATION OF EXISTING LAW

SEC. 305. No provision of law in force on the date of enactment of this Act shall be construed to authorize any action inconsistent with the provisions and purposes of this Act.

SHORT TITLE

SEC. 306. This Act may be cited as the "Emergency Price Control Act of 1942".

Approved, January 30, 1942.

No. 10,540.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ARON ROSENSWEIG and ABE ROSENSWEIG,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S SUPPLEMENTAL BRIEF.

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FILED

MAY 20 1944

PAUL P. O'BRIEN,
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APPELLEE'S SUPPLEMENTAL BRIEF.

Statement.

At the time this appeal came on for hearing on March 24, 1944, oral argument was restricted by reason of the fact that the cases of *Yakus v. United States* and *Rottenberg v. United States*, then awaiting decision by the United States Supreme Court, might be determinative of most of the issues here involved. Leave, however, was granted counsel to file a supplemental brief. After the decision of the Supreme Court in the *Yakus* and *Rottenberg* cases (64 S. Ct. 660, March 27, 1944), appellants filed a supplemental brief which raises two questions which appellants

contend were not covered by the decision of the Supreme Court.

The first contention of appellants is that the Regulation "is without application to the offense charged." They urge that a side of beef, admittedly sold over the ceiling price prescribed by the Regulation, is an "agricultural commodity" and that because such ceiling price was not approved by the Secretary of Agriculture as prescribed by Section 3(e) of the Act, the Regulation "does not cover and is not applicable to the sale of the side of beef."¹ (App. Supp. Br. p. 5.)

Point II of Appellant's Supplemental Brief again raises the question of whether the trial court abused its discretion in refusing to vacate the judgment and sentences, in refusing permission to re-enter pleas of not guilty, and in denying a new trial. This question was fully treated by the Government in its original brief (Br. pp. 26-43), and we do not think it necessary to add any further comment or analysis thereto.

¹All of the powers and functions of the Secretary of Agriculture under the Act have been transferred to the War Food Administrator. Wherever in this brief any reference is made to the Secretary of Agriculture it should be construed as meaning and including the War Food Administrator.

I.

The Contention That the Regulation Never Became Effective Is an Attack on the Validity of the Regulation and Cannot Be Considered in This Case.

Appellants argue that a side of beef is an agricultural commodity; that Section 3(e) of the Act prohibits the Administrator from taking any action under the Act with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; that the Secretary of Agriculture never approved the maximum prices prescribed by the Regulation for sides of beef and that therefore the Regulation to the extent that it prescribes maximum prices for sides of beef never became effective. This is just another way of saying that the Regulation is invalid because not approved by the Secretary of Agriculture. The Act does not provide that Regulations fixing prices for agricultural commodities shall be issued jointly by the Administrator and the Secretary of Agriculture. Under Section 2(a) of the Act Regulations establishing maximum prices may be issued only by the Administrator. Section 3(e) merely prohibits the Administrator from issuing a Regulation fixing maximum prices for agricultural commodities without prior approval of the Secretary of Agriculture. The latter's approval is only one of many statutory requirements which must be observed by the Administrator in issuing a Regulation. The approval of the Secretary of Agriculture need not be manifested in any particular manner. It may be given orally or in writ-

ing. It need not be endorsed upon the Regulation. If the Administrator should issue a Regulation which fixed maximum prices for agricultural commodities without the prior approval of the Secretary of Agriculture, the Regulation would be invalid, just as it would be invalid if the Administrator failed to observe any of the other requirements prescribed by the statute. But it could not be successfully contended that the Regulation had not been issued. Therefore, in saying that the Regulation never became effective, appellants are in reality attacking the validity of the Regulation on the ground that the Administrator failed to abide by one of the requirements of the statute.

Since the contention now urged by the appellants is simply an attack on the validity of the Regulation, it follows that it cannot be considered in the present proceeding.

Yakus v. United States, 64 S. Ct. 660;

U. S. v. Pepper Bros, 3d Cir., No. 8602, decided May 3, 1944.

Nor can appellants draw any comfort from the fact that the Supreme Court in the *Yakus* case did not pass on the question "whether one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face."

As said above, the approval of the Secretary of Agriculture to a Regulation prescribing maximum prices for agricultural commodities need not be manifested in any particular manner. It may be given orally, or by interdepartmental memoranda, by letter or in any other manner. Only by resort to extrinsic evidence could it be ascertained whether or not the Secretary of Agriculture had approved the Regulation involved in this case. The Regulation, therefore, is not invalid on its face.

Furthermore, Section 204(d) bars all attacks on the validity of a Regulation in a proceeding such as this, irrespective of whether the alleged invalidity appears on the face of the Regulation or not.

The language of Section 204(d) of the Act is plain. No court, except the Emergency Court of Appeals and the Supreme Court, has jurisdiction or power to consider the "validity" of maximum price regulations. The statute speaks without qualification or limitation of any kind of "validity." In fact, Section 204(d) provides that one of the matters falling within the exclusive jurisdiction of the Emergency Court of Appeals is the authority to determine whether a challenged Regulation is "in accordance with law," a provision which clearly encompasses the objection raised by appellants. In favorably reporting this section of the statute to Congress, the Senate Committee on Banking and Currency stated (Sen. Rep. No. 931, 77th Cong., 2nd sess., 1942, at pp. 7-8, 24):

"The Emergency Court . . . may examine the entire record before the Administrator to determine *whether he acted in accordance with the statute*, whether the procedure that he has followed is in accordance with accepted standards of due process of law, and whether he has exercised a reasonable judgment on questions committed to his discretion.

* * * * *

"By applying these standards the [Emergency] Court [of Appeals] has ample power to keep the Administrator within the bounds prescribed by the bill." (Emphasis supplied.)

The Committee report continues (p. 24):

"Section 204(d) further provides expressly that no court, other than the Emergency Court and the Su-

preme Court shall have jurisdiction or power to consider the *validity, constitutional or otherwise*, of any regulation or order issued under Section 2." (Emphasis supplied.)

The purpose of Section 204(d) is further revealed by the following excerpt from the report of the Senate Committee (p. 7): "The Emergency Court is established in order to avoid the confusion which would result from conflicting decisions in different circuits on the same regulations."

This clear legislative intent has been given full effect in cases arising under the Act. In *Brown v. Cummins Distilleries Corp.*, 53 F. Supp. 659 (W. D. Ky., 1944), the court considered the same question as that presented by the instant case. In holding that Section 204(d) precluded consideration as to whether the Regulation had been approved by the Secretary of Agriculture, the court said:

"Defendants further contend that the sales in question, even though construed as sales of whiskey, are not subject to the Act because Section 3 thereof restricts in the way provided therein the establishment of a maximum price for any commodity processed or manufactured in whole or substantial part from any agricultural commodity, as referred to hereinabove. It is pointed out that whiskey is processed or manufactured from an agricultural commodity and that the Regulation in question does not establish for whiskey in bulk a maximum price according to the formula provided by the Act. This may be true, but it does not follow that a maximum price for whiskey was not established by the Regulation, although reached by an incorrect or invalid procedure. Undoubtedly this

Court has the right to construe the regulation in order to determine its scope, but after Court, in so doing, has not further jurisdiction to adjudge the regulation invalid."

In *Brown v. Liniavski et al.*, 53 F. Supp. 513 (S. D. N. Y., 1943), the defendants attacked the validity of a Regulation governing export prices. They argued that the Act nowhere granted authority to the Administrator to govern export prices, and that the Regulation was therefore invalid as a matter of law. In holding that Section 204(d) precluded consideration of such a problem, the District Court said:

"There is no exception provided in the section, except the right given to the Emergency Court of Appeals. I see no reason for making a distinction between the following types of invalidity:

a. That the Price Administrator acted arbitrarily or capriciously in promulgating a regulation.

b. That the Price Administrator had promulgated a regulation which the statute does not authorize him to fix.

c. That the Price Administrator had promulgated a regulation which regulation is based upon an interpretation of the Act which may be said to be unconstitutional. In other words, a regulation invalid as being an unconstitutional attempt to exercise legislative power.

"Each one of these of the above three objections to a regulation is an attack upon the validity of the regulation and under the plain terms of the Act may not be asserted in this Court, but is within the exclusive jurisdiction of the Emergency Court of Appeals."

Similarly, in *Brozen v. Oklahoma Operating Co.* (W. D. Okla., 1943), OPA Service 620:128, it was argued by defendant that the Regulation controlling the price of laundry services was not a "commodity" and therefore unauthorized by statute, the court stated:

"Whether or not the definition of the term 'commodity' in Section 302(e) of the Emergency Price Control Act of 1942 includes the operation of a laundry is a question involving the validity of Maximum Price Regulation No. 165, a matter which this court is precluded from considering under the provisions of Section 204(d) of the Emergency Price Control Act of 1942."

Clearly the disruption which would be caused in the price control program by permitting decisions, and possible conflicts of decisions in the various state and federal courts throughout the country as to the validity of Regulations for defects allegedly appearing on the face of the Regulation, would be no less injurious to the war effort than the disruption caused by decisions which reach the same result on grounds allegedly not appearing on the face of the Regulation.

From the foregoing, it is, we submit, obvious that appellants' contention that the Regulation never became effective is an attack upon the Regulation which cannot be considered in this proceeding.

If the contention could be considered, it is plainly without merit because sides of beef are not agricultural commodities and the approval of the Secretary of Agriculture is not required as a condition to prescribing maximum prices therefor.

II.

Sides of Beef Are Not Agricultural Commodities but Products Processed From Agricultural Commodities and the Approval of the Secretary of Agriculture to the Establishment of Maximum Prices Therefor Is Unnecessary.

As we have previously shown, the Act draws a distinction between agricultural commodities and products processed from agricultural commodities. Section 3(e) requires the approval of the Secretary of Agriculture prior to any action being taken by the Administrator with respect to agricultural commodities, but his approval is not required with respect to any action relating to products processed from agricultural commodities. This is clearly shown by the legislative history of the section.

Section 3(e) was adopted as a result of an amendment sponsored by Senator Bankhead while the bill which subsequently became the Emergency Price Control Law was being debated in the Senate. In its original form the amendment proposed by Senator Bankhead read as follows:

“Notwithstanding any other provision of law, no action shall be taken by the Administrator or any other person with respect to an agricultural commodity *or commodity processed or manufactured in whole or in substantial part from any agricultural commodity* without the prior approval of the Secretary of Agriculture.” (Emphasis supplied.)

The amendment thus in its original form covered not only agricultural commodities but products processed therefrom. This is exactly the way the appellants would have the court construe the section. Senator Bankhead, the

sponsor of the amendment, however, struck from the amendment the provisions relating to commodities processed or manufactured from agricultural products, saying (88 Cong. Rec. 160, 77th Cong., 2d sess.):

“In addition to agricultural commodities, the original amendment included commodities processed or manufactured in whole or in substantial part from any agricultural commodity . . . of course we have no desire to have the amendment cover anything but products dealt with by the Secretary of Agriculture and in the production and price of which the farmer, the agricultural producer, has a direct, immediate, pecuniary interest; . . . so now the amendment is brought right down to agricultural commodities.”

Other statements made during the course of the debate confirm this construction.

Thus Senator McNary said:

“Mr. President, I know from reading the bill that any fair-minded person must come to the conclusion that the words ‘agricultural commodity’ refer to the raw materials produced in the farm. Otherwise, there would not be a separate subsection dealing with processed and manufactured goods. The two subsections, read together, define the term.

* * * * *

“When we want to enter the field of refined, manufactured, or processed commodities, we use the proper language.” (88 Cong. Rec. 182, 77th Cong., 2d sess., 1942.)

Senator Overton made a similar statement:

“When the Bankhead amendment refers to agricultural commodities it refers solely to raw agricul-

tural commodities. It does not refer to processed agricultural commodities or commodities manufactured in whole or in substantial part from agricultural commodities.” (88 Cong. Rec. 173, 77th Cong., 2nd sess., 1942.)

And Senator George repeated the same thought:

“As I understand, the amendment applied strictly to agricultural products and not to processed or manufactured articles made from manufactured products.” (88 Cong. Rec. 180, 88th Cong., 2nd sess., 1942.)

This construction of Section 3(e) of the Act finds confirmation in other subsections of Section 3. Sections 3(a) and (b) refer only to agricultural commodities and the methods which are to be used in determining parity prices. Section 3(c) specifically provides that the producers of agricultural commodities (*i. e.*, the farmers) shall obtain parity prices for agricultural commodities, and that maximum prices established on commodities processed or manufactured therefrom shall not be below the price as determined by Section 3(a). Section 3 of the Act of October 2, 1942 (56 Stat. 765, 50 U. S. C. App. Supp. II, Sec. 961), likewise makes this distinction, wherein it provides:

“That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing; Provided further, that in fixing price maximums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, as provided by this Act, adequate weighing shall be given to farm labor.”

Such a distinction is well recognized.

Webster's New International Dictionary, 2nd Ed., 1939;

Kennedy v. State Board of Assessment and Review, 276 N. W. 205, 224 Ia. 405 (1937);

Fuhrman & Forster Co. v. Com'r of Internal Revenue, 114 F. (2d) 863 (C. C. A. 7th, 1940), and

Colbert Mill and Feed Co. v. Okla. Tax Com'n, 188 Okla. 366, 109 F. (2d) 504.

It is plain, therefore, that no approval of the Secretary of Agriculture is required with respect to any action taken by the Administrator in reference to products processed from agricultural commodities as distinguished from agricultural commodities. This is not seriously contested by appellants who now contend that sides of beef are not products processed from agricultural products but simply agricultural commodities. We think the contrary is obvious. Live cattle are agricultural commodities. When they are slaughtered and their carcasses are dressed a processed product results. In other words before carcasses and sides of beef can be produced the cattle must be subjected to processing.

Appellants in contending that beef carcasses are agricultural commodities place their entire reliance on the definition of "processed products" contained in Revised Maximum Price Regulation No. 169. That definition has nothing to do with the case. We are not here concerned with the meaning of the term "processed products" as used in the Regulation but with the meaning of the terms "agricultural commodities" and "products processed from agricultural commodities" as used in the statute. The Regulation prescribes maximum prices for (a) beef carcasses

and wholesale cuts, (b) veal carcasses and wholesale cuts and (c) processed products. All of these products, including carcasses and wholesale cuts, are products processed from agricultural commodities and none of them is an agricultural commodity.

It follows that in any case the approval of the Secretary of Agriculture to establishment of maximum prices for sides of beef was and is unnecessary.

Conclusion.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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No. 10,540

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ARON ROSENSWEIG and ABE ROSENSWEIG,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

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No. 10,540

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ARON ROSENSWEIG and ABE ROSENSWEIG,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

*To the Honorable Curtis D. Wilbur, Presiding Judge, and
to the Associate Judges of the United States Circuit
Court of Appeals for the Ninth Circuit:*

The appellants in the above entitled cause (No. 10,540) respectfully petition the United States Circuit Court of Appeals for the Ninth Circuit, its Presiding Judge and Associate Judges, to grant a rehearing upon the following grounds:

(1) The Court has erroneously decided that there is nothing on the face of Revised Maximum Price Regulation No. 169 to indicate that the Secretary of Agriculture has not approved it.

(2) The Court has erroneously decided that there is no requirement of law that it appear on the face of Revised Maximum Price Regulation No. 169 that approval thereof by the Secretary of Agriculture has been had.

(3) The Court has erroneously decided that Appellants' claim that Revised Maximum Price Regulation No. 169 did not become effective and enforceable is no more than a claim that said Regulation is invalid.

(4) The Court has erroneously decided that no error was committed by the trial court in overruling appellants' motion for permission to withdraw their pleas of "guilty" and re-enter their former pleas of "not guilty."

ARGUMENT.

I.

Revised Maximum Price Regulation No. 169 Shows on Its Face That It Was Not Approved as Required by Section 3(e) of the Emergency Price Control Act.

In its opinion herein this Honorable Court stated that:

“There is nothing on the face of the Regulation to indicate that the Secretary of Agriculture has not approved it, * * *.”

This statement of the Court does not take into consideration the requirement of law that all Regulations promulgated by the Price Administrator must, before they can become effective, be published in the Federal Register, and that when so published it will be presumed that the copy published therein is a true copy of the original thereof. (Sections 305 and 307 of Title 44 U. S. C. A.)

In this connection, Section 307 of Title 44 U. S. C. A. provides, in part, as follows:

“The publication in the Federal Register of any document shall create a rebuttable presumption * * * (c) that the copy contained in the Federal Register is a true copy of the original; * * *.”

The copy of Revised Maximum Price Regulation No. 169 published in the Federal Register (hereinafter referred to as Regulation No. 169) must therefore be presumed to be a true copy of the original promulgated by

the Administrator. The copy published in the Federal Register shows on its face that it was not signed by the Secretary of Agriculture or by the War Food Administrator, and hence it must be presumed that the original thereof was not signed by either of said officials. In turn, this creates a presumption that the original Regulation was not approved by said officials, or either of them, as required by the Act.

It should be noted that Regulation No. 169 is an act of administrative legislation. It is analogous to an Act of Congress; and it was issued under a specific delegation of legislative power by the Congress to the Price Administrator *and the Secretary of Agriculture* in so far as agricultural commodities are concerned. The Congress saw fit to require the joint action of the Price Administrator and the Secretary of Agriculture in the fixing of maximum prices for agricultural commodities, and neither of those officials alone has power to promulgate Regulations fixing such prices without the action or approval of the other. It was the obvious purpose of Congress to require such joint action before this administrative legislation could lawfully be enacted or become effective as law.

The requirement of the Act that, as to agricultural commodities a Regulation issued by the Price Administrator must have the "*prior* approval" of the Secretary of Agriculture before it can become effective is mandatory. That requirement is as absolute as the constitutional requirement that an Act of Congress must be passed by both

the House of Representatives and the Senate before it can become law. It is as absolute as the constitutional requirement that a treaty negotiated by the President must be approved by the Senate before it can become effective.

It is not contended by Appellee that Regulation No. 169 was approved by the Secretary of Agriculture or by the War Food Administrator. The burden of appellee's argument throughout this case has been that a side of beef is not an agricultural commodity and that therefore approval of the Regulation by the Secretary of Agriculture was not necessary. But this argument ignores the provisions and definitions contained in the Regulation and Act. (See Appellants' Supp. Br., pp. 5-11, and the authorities there cited.) Moreover, it affirmatively appears from the official proceedings of a Congressional Committee that Regulation No. 169 was not approved by the Secretary of Agriculture or by the War Food Administrator prior to the publication thereof in the Federal Register, or at any other time. (See Hearings before the Special Subcommittee of the House Committee on Agriculture, Thursday, October 28, 1943: Specifically, the testimony of Dr. Richard B. Gilbert, Chief Economist of the Office of Price Administration.)

For these reasons Regulation No. 169 did not become effective as to agricultural commodities, and hence the alleged violation thereof did not constitute an offense against the laws of the United States.

II.

It Is Settled Law That Legislative Bills Shall Be Signed by the Executive as Evidence of His Approval Thereof.

It is clear that an administrative Regulation, such as is here involved, is legislation and is the equivalent of an Act of Congress. As such legislation it is on general principles subject to the same rules and requirements for the approval thereof that are applicable to Acts of Congress and State Legislatures. The "prior approval" of a Regulation, relating to an agricultural commodity, before it can become effective, is comparable to the approval of Acts of Congress by the President, or to the approval of legislation by the Governor of a State. As to these, it is the general rule that "approval" thereof must appear by the signature of the chief executive. Brief reference to the authorities so shows.

In 25 *R. C. L.* 886, Section 136, the general rule here applicable is stated as follows:

"The constitutions of the United States and nearly all the states contain provisions to the effect that every bill which shall have passed both houses of the legislature shall be presented to the chief executive; *if he approves he shall sign it . . .*" (Italics ours.)

To the same effect are 50 *Am. Jur.* 107, Section 105; 50 *C. J.* 582, Section 110.

The rule stated by the text writers, *supra*, is peculiarly applicable to federal legislation because of constitutional provisions and requirements. These provisions and requirements set a pattern for the approval of *all* federal legislation.

The Constitution of the United States (Art. I, Section 7, clause 2) provides that after passage of a bill by both houses of Congress it shall be presented to the President and "if he approves he shall sign it." This provision is mandatory. (*Gardner v. Collector*, 6 Wall. 506, 18 L. Ed. 890.) No other method of approval of federal legislation is provided by the Constitution.

The Constitution of the State of California contains a like provision which was construed by the Supreme Court of that State in the case of *Lukens v. Nye*, 156 Cal. 498. In that case the Court said, at page 503:

"If he approves a proposed bill, his duty requires him to sign it as evidence of his approval . . . His (the Governor's) signature, when it is shown to have been attached, is the exclusive and conclusive evidence of his unqualified approval, and the result being law, no evidence, nor the judgment of any court can be allowed to modify or change its terms or effect, or prevent or impair its complete operative force."

The constitutional provisions referred to were designed to prevent doubt and uncertainty as to whether each and every step necessary to enact legislation was duly taken, so that the public and the courts may know that what purports to be law is indeed the law. No good reason can be adduced for excepting administrative legislation from the operation of the rule invoked. On the contrary, reason as well as authority demands that administrative legislation shall be subject to the provisions and requirements of the Constitution relating to the passage and approval of congressional legislation.

It should again be noted, in this connection, that the Regulation shows on its face that it was not approved by the Secretary of Agriculture or War Food Administrator. Moreover, the official proceedings of the Special Subcommittee of the House Committee on Agriculture supply ample evidence that Regulation No. 169 was not approved as required by Section 3(e) of the Act (*supra*).

III.

The District Court and This Court Have Jurisdiction to Determine That Regulation No. 169 Did Not Become Effective as to Agricultural Commodities.

In the several briefs filed herein prior to the decision of the Supreme Court of the United States in *Yakus v. United States*, U. S., 88 L. Ed. (Adv.) 653, a considerable portion of the arguments of appellants and appellee was upon the question of the *constitutional validity* of the Emergency Price Control Act and Revised Maximum Price Regulation No. 169. Following that decision appellants filed a supplemental brief upon the questions remaining in this case. One of the points discussed therein was that

“Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381), if otherwise valid and effective, does not cover and is without application to the offense charged in Count I of the Information.” (Appellants’ Supp. Br. p. 5.)

The gist of appellants’ argument upon that proposition was that Regulation No. 169 did not become effective as to agricultural commodities, because it was not approved by the Secretary of Agriculture or by the War Food Administrator, as required by Section 3(e) of the

Emergency Price Control Act. And, in this connection appellants showed that a side of beef or "beef carcass" (such as they were charged with selling at a price in excess of the price alleged to have been fixed by the Price Administrator), is an agricultural commodity. (Appellants' Supp. Br. pp. 5-11.)

In disposing of this proposition and argument this Honorable Court said (Opinion p. 5):

"It (Regulation No. 169) may or may not have been approved, but that is not here pertinent for we are of the opinion that appellants' claim that the Regulation did not become enforceable is no more than a claim that the Regulation is invalid. * * * The district court and this circuit court of appeals have no jurisdiction to consider the contention that the Regulation is invalid. *Yakus v. United States*, Case No. 374, decided by the Supreme Court March 27, 1944, U. S."

Appellants earnestly insist that in so deciding this Honorable Court has failed to consider the distinction between a Regulation that is constitutionally invalid and a Regulation that never came into existence for some other reason. Let us illustrate, if possible, this distinction. If a Bill of Congress is passed by the House but is not passed by the Senate it simply does not come into existence as a law. For a Court to so hold would in no sense involve deciding that the provisions thereof are constitutionally invalid.

It may be urged, however, that for the Court to hold that the Regulation never came into legal existence would be to hold that it is "invalid" within the purview of the decision of the Supreme Court in *Yakus v. United States*,

supra. We do not believe that the *Yakus* decision is that inclusive, or that it is applicable to every conceivable kind of invalidity of a Price Regulation. Of great significance in this connection is the following statement of the Supreme Court in the *Yakus Case* (..... U. S., 88 L. Ed. 672):

“We have no occasion to decide whether one charged with criminal violation of a *duly promulgated* price regulation may defend on the ground that the regulation is unconstitutional on its face. * * * *There is no contention that the present regulation is void on its face*, petitioners have taken no step to challenge its validity by the procedure which was open to them and it does not appear that they have been deprived of the opportunity to do so. Even though the statute should be deemed to require it, any ruling at the criminal trial which would preclude the accused from showing that he had had no opportunity to establish the invalidity of the regulation by resort to the statutory procedure, would be reviewable on appeal on constitutional grounds. It will be time enough to decide questions not involved in this case when they are brought to us for decision, as they may be, whether they arise in the Emergency Court of Appeals or in the district court upon a criminal trial.” (Italics ours.)

If, as may be contended by appellee, the Supreme Court's decision was intended to prevent a defendant in a criminal prosecution from defending on the ground that the Regulation is unconstitutional, or void, on its face, then the above quoted language of the Court is not only pure dictum but is also utterly meaningless and confusing. It

can hardly be presumed that the Supreme Court would gratuitously inject into its opinion such a statement without good reason for so doing, but whatever meaning may be attributed to the statement of the Court, *supra*, it cannot be questioned that the Court intended to and did reserve for future decision, when the occasion should properly arise, the right of a defendant on trial for violation of a Price Regulation to defend on the ground that it is unconstitutional, or void, on its face. Therefore, that question is wide open for decision at this time.

It should be noted in the *Yakus Case* there was no contention that the regulation was void on its face, or that it was not duly promulgated. There was only the contention that both the Act and the Regulation were constitutionally invalid.

In the case at bar appellants have contended at all times that Regulation No. 169 never became effective because it was not duly promulgated—that is, it was not approved by the Secretary of Agriculture before its attempted promulgation by the Price Administrator as required by law. Therefore, the regulation is void on its face and may be challenged under the reservations made by the Supreme Court in the *Yakus* decision, *supra*.

It is apparent that if the Supreme Court had believed that the validity of a Regulation, void on its face, could not be challenged by a defendant charged with the violation thereof in a criminal proceeding, it could have so held. The meaning of the Court's statement reserving that question for future decision is therefore important.

As bearing upon the meaning of the quoted language of the majority opinion is the statement of Mr. Justice Rutledge in his dissenting opinion, in which Mr. Justice Murphy concurred. It was there said (88 L. Ed. 691):

“From what has been said it seems clear that Congress cannot forbid the enforcing court, exercising the criminal jurisdiction, to consider the constitutional validity of an order (Regulation) *invalid on its face*. Any other view would permit Congress to compel the courts to enforce unconstitutional laws.” (Italics ours.)

And, we may well add, that “any other view would permit Congress to compel the courts to enforce” a Regulation that never came into existence, or that is void on its face.

It is well settled that an unconstitutional statute, or a wholly void statute, is as inoperative as if it had never been passed, and the courts are not bound to enforce it. The same is true of an administrative order or Regulation which is void on its face, for certainly in this respect a mere administrative order could have no higher standing before the courts, or in law, than an act of the legislature.

In 6 R. C. L. 117, Section 117, it is said:

“The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed. Since an unconstitutional law is void, it imposes no duties and confers no power or authority on any one; it affords no protection to any one, and no one is bound to obey it, and no courts are bound to enforce it.”

Many cases, both State and Federal, are cited in support of the textual statement, *supra*. See, especially, *United States v. Realty Company*, 163 U. S. 427, 41 L. Ed. 215; *Chicago, I. & L. R. Co. v. Hackett*, 228 U. S. 559, 57 L. Ed. 966. In the latter case the Supreme Court said (57 L. Ed. 969):

“That act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not law, and can neither confer a right or immunity nor operate to supersede any existing valid law. *Norton v. Shelby County*, 118 U. S. 425, 442, 30 L. Ed. 178, 186, 6 Sup. Ct. Rep. 112; *Ex parte Siebold*, 100 U. S. 371, 376, 25 L. Ed. 717, 719.”

IV.

This Court Has Erroneously Decided That No Error Was Committed by the Trial Court in Overruling Appellants' Motion for Permission to Withdraw Pleas of Guilty and Re-enter Pleas of Not Guilty, and for a New Trial.

It is apparent that the majority opinion is based, in large measure, upon a misconception of the facts in evidence. This misconception clearly appears from the following statements in the opinion (pp. 6, 7):

“There was testimony to the effect that before the pleas of guilty were entered the report of the Probation Officer's recommendations were read to the attorney for appellants. . . . The attorney for the appellants denied that the recommendations of the Probation Officer had been read to him before the pleas of guilty were entered. The resolving of the conflicting evidence was within the discretion of the trial court.”

If, as this language implies, the decision of this Court rests upon the assumption that appellants pleaded guilty with full knowledge of the recommendations of the Probation Officer, then it has no basis in fact whatsoever. The record shows that appellants pleaded not guilty on August 2, 1943 [R. 13-14]; that after some negotiations with the United States Attorney and OPA Attorneys, they changed their pleas to guilty as to Counts I and III on August 11, 1943 [R. 15-16]; that the trial court referred the matter to the Probation Officer on the same day, that is, August 11, 1943 [R. 15]; and that the report was filed on or about August 30, 1943 [R. 78-79]. It thus unmistakably appears that the Probation Officer's report was not made until approximately two weeks after pleas of guilty had been entered. In so far, therefore, as the Court's opinion rests upon the language of the opinion quoted, *supra*, it is clearly erroneous.

The Record Shows That There Was an Understanding and Agreement Between Appellants and the Government That Only Moderate Fines and No Sentence of Imprisonment Would Be Imposed.

It is not necessary here to restate in detail the evidence about the understanding and agreement which induced appellants to change their pleas from not guilty to guilty. But reference to the affidavit of Mr. Kinnison, Assistant United States Attorney, is alone sufficient to show that the understanding and agreement relied on was reached. [See R. 75-80.] Mr. Kinnison testified that he talked with appellants' counsel on August 6, 1943, again on August 7, 1943, and on August 10, 1943, about the pro-

posed change in pleas. Mr. Kinnison testified [R. 78] that on August 10, 1943:

“Your affiant advised Mr. Preston that it was the custom of that (United States Attorney’s) office not to recommend a specific amount as to a fine. Mr. Preston then requested your affiant to discuss the matter with the probation office and advised him thereof.

“Thereafter, on the same day, your affiant talked to Mr. Meader, of the probation department, giving him the facts of the case and stating that Mr. Preston had suggested the amount of Five Hundred (\$500.00) Dollars as being a reasonable amount to fine the defendants. Mr. Meader stated that upon the facts stated, if the defendants had no prior record, ‘and all other things being equal,’ the probation office would undoubtedly recommend a ‘moderate fine.’ Thereafter, on the same day (August 10, 1943) your affiant called Mr. Preston on the telephone and repeated to him the statements made by Mr. Meader. Arrangements were then made to advance the case upon the calendar for defendants to change their plea.”

The following day, August 11, 1943, the defendants changed their pleas on Counts I and III.

Under Mr. Kinnison’s evidence alone, it cannot be doubted that he transmitted to the Probation Officer the “suggestion” of appellants’ counsel and that defendants be fined a total of \$500.00 on Counts I and III, and that the Probation Officer agreed to recommend such a fine if defendants had no prior criminal record. Nor can it be doubted that Mr. Kinnison transmitted said agreement of the Probation Officer to Appellants’ counsel and that on

the basis thereof *“arrangements were then made . . . to change their pleas”* the following day. Moreover, it cannot be doubted that a sentence of imprisonment was never contemplated by the United States Attorney, or by the Probation Officer, or by appellants and their attorneys. Indeed, imprisonment was specifically excluded from all conversations and negotiations.

The United States Attorney and the Probation Officer Failed to Live Up to the Understanding and Agreement.

The record shows that the Probation Officer recommended [R. 79]:

“Because of the clear past record of these defendants, penitentiary sentence is not recommended. It is recommended that they be given a heavy fine and placed on probation.”

This was a violation of the understanding and agreement that “the probation office would undoubtedly recommend a ‘moderate fine.’” A fine of \$1,000.00 for each defendant is obviously not moderate, but exceedingly heavy. It was certainly in violation of what Mr. Kinnison told appellants’ attorneys the Probation Officer had agreed to recommend to the trial court.

It should be observed that the Probation Officer’s recommendation refers to “the clear past record of these defendants.” This finding required that in conformity with the agreement, the Probation Officer recommend a “moderate” fine, or specifically the aggregate fine of \$500.00 for both defendants, since the change of pleas was based upon the Probation Officer’s agreement to recommend that amount if defendants “had no prior record.”

The Trial Court Disregarded the Probation Officer's Recommendation and the Agreement in Material Respects.

While it is manifest that the Probation Officer did not keep the agreement made, it is also manifest that the trial court entirely disregarded it in the imposition of a jail sentence upon defendant Aron Rosensweig and fines upon both defendants greatly in excess of the amount agreed on.

It is conceded that the trial court had both power and discretion to disregard recommendations of counsel and the Probation Officer. But where, as here, it clearly appeared that the defendants had changed their pleas of not guilty to guilty upon the agreement or promise of Government Officers to recommend sentences involving only moderate fines *and no imprisonment*, it was an abuse of discretion for the trial court to refuse permission to defendants to change their pleas if the court intended to disregard both the recommendations and the agreement.

Under These Facts the Trial Court Should Have Permitted Defendants to Withdraw Their Pleas of Guilty, and Should Have Granted a New Trial.

In numerous cases, where the facts were not more favorable to the defendants involved, the Courts have held that it was error and an abuse of discretion for the trial court to refuse leave to withdraw pleas of guilty and substitute therefor pleas of not guilty. Some of these cases have been cited and quoted from in appellants' several briefs filed herein. See,

United States v. Fox, 130 F. 2d 56, 59;

Kercheval v. United States, 274 U. S. 220, 71 L. Ed. 1009;

United States v. Woody, 2 F. 2d 262;

Deutsch v. Aderhold, 80 F. 2d 677, 678;
Paris v. United States, 137 F. 2d 300;
Clemons v. United States, 137 F. 2d 302;
People v. Schwarzs, 201 Cal. 309;
Camarota v. United States, 2 F. 2d 650, 651.

See, also, Appellants' Op. Br. pp. 19-23; Appellants' Rep. Br. pp. 32-38; and Appellants' Supp. Br. pp. 12-23, for discussion of this question.

The decision of the Circuit Court of Appeals in *Ward v. United States*, (6 Cir.) 116 F. (2d) 135, is also squarely in point. In that case the facts, as stated by the Court, were as follows.

"Appellant * * * was indicted for violation of the mail fraud statute, 18 U. S. C. A. Section 338, and for conspiring to commit that offense * * *. He first pleaded not guilty to both indictments. Counsel for the United States thereafter sought to induce him to change his pleas and testify against others considered more deeply involved. They promised to recommend a sentence that would involve no imprisonment and assured appellant that pleas of guilty would result in no more than a fine, or suspended sentence, or both, though they said they could not state definitely what punishment would be imposed. They made these statements in good faith and after discussion with the trial judge. Relying thereon, appellant entered pleas of guilty, * * *."

Learning later, when sentence was about to be pronounced upon him, that the trial court did not intend to follow the recommendations of government counsel, the appellant Ward asked leave to withdraw pleas of guilty

and institute therefor pleas of not guilty, which the court refused. The Appellate Court said, pp. 136, 137:

“The sole question here presented is whether it was reversible error to refuse leave to withdraw the pleas of guilty, on the basis of which the foregoing sentences were imposed.

“(1) We do not find that this question has been decided by any federal appellate court. The prevailing view, however, appears to be that the trial court’s denial of leave to withdraw a plea of guilty is examinable on review to determine whether such denial is in accord with the exercise of a sound judicial discretion. *State v. Maresca*, 85 Conn. 509, 83 A. 635; *Gardner v. People*, 106 Ill. 76; *Myers v. State*, 115 Ind. 554, 18 N. E. 42; *Little v. Commonwealth*, 142 Ky. 92, 133 S. W. 1149, 34 L. R. A., N. S., 257, Ann. Cas. 1912D, 241; *State v. Hill*, 81 W. Va. 676, 95 S. E. 21, 6 A. L. R. 687.

“(2) It is not error to refuse leave to withdraw the plea if the defendant fully understood his rights, the nature of the charge against him, and the consequences of such a plea. *Miller v. State*, 160 Ark. 245, 254 S. W. 487; *Pope v. State*, 56 Fla. 81, 47 So. 487, 16 Ann. Cas. 972; *State v. Raponi*, 32 Idaho 368, 182 P. 855; *State v. Williams*, 45 La. Ann. 1356, 14 So. 32; *Hubbell v. State*, 41 Wyo. 275, 285 P. 153. On the other hand, it is error to deny leave to withdraw the plea when it was entered because of misunderstanding of its effect or because of misrepresentation. *Krolage v. People*, 224 Ill. 456, 79 N. E. 570, 8 Ann. Cas. 235; *Mounts v. Commonwealth*, 89 Ky. 274, 12 S. W. 311, 11 Ky. Law Rep. 474; *State v. Nicholas*, 46 Mont. 470, 128 P. 543; *State v. McAllister*, 96 Mont. 348, 30 P. 2d 821. There is ample precedent among the state court decisions for

the view that it is reversible error to refuse leave to withdraw the plea under circumstances such as appear in the case at bar. *Griffin v. State*, 12 Ga. App. 615, 77 S. E. 1080; *East v. State*, 89 Ind. App. 701, 168 N. E. 28; *State v. Stephens*, 71 Mo. 535; *State v. Cochran*, 332 Mo. 742, 60 S. W. 2d 1; *Sloan v. State*, 54 Okl. Cr. 324, 20 P. 2d 917.”

The court concluded that the trial court erred in refusing leave to withdraw pleas of guilty, citing *Griffin v. State*, 12 Ga. App. 615, 77 S. E. 1087 in support of its decision.

In *Griffin v. State*, 12 Ga. App. 615, 77 S. E. 1087, *supra*, the court said:

“It was discretionary with the trial judge whether he would receive the plea of guilty at all. If he knew that it was entered under the mistaken belief, engendered by an agreement of state’s counsel, that the punishment would be less than the maximum, the plea ought not to have been received until the accused had been admonished that the judge would not be bound by any such agreement. Of course, in theory, the accused knew that this was true; but if they, in fact, honestly thought the agreement would be carried out, then they ought to have relief from the plea. If the state is not bound by the agreement its counsel made, then the accused ought not to be held to their waiver, made on the faith of such agreement. That the accused were actually misled by the representations of state’s counsel is undisputed, and, as illustrating the strong conviction of these able and upright attorneys that the accused had been misled by their statements, when the trial judge, in the exercise of his discretion, refused to abide by their agreement, they retired from the case and declined to attempt in the reviewing court to sustain the sentences imposed upon the accused.”

The Action of the Trial Court in Denying Motions to Vacate Judgments Is Reviewable on This Appeal.

In the concurring opinion it is indicated that the abuse of discretion by the trial court is not reviewable here because the appeals were only from the judgments. This view overlooks the fact that the motion to vacate judgments and to permit withdrawal of pleas and to substitute other pleas therefor was also a motion for a new trial and as such is reviewable on the appeals from said judgments under Rule 3 of Rules of Criminal Procedure after Plea of Guilty or Verdict or Finding of Guilt. (18 U. S. C. A. following Section 688). Proceedings on said motion were interlocutory or ancillary to the judgments, hence reviewable.

Moreover, there is a conflict in the opinions of this court as to whether orders denying motions to vacate judgments are final and appealable. See *Republic Supply Co. of California v. Richfield Oil Co.*; 74 F. (2d) 909, at p. 910 where this Court through Judge Wilbur, said:

“The general rule is that no appeal will lie from an order denying a motion to vacate or modify a judgment, decree, or order.” (Citing numerous cases).

In *Bensen v. United States*, 93 F. (2d) 749, the defendant attempted to appeal from a motion to set aside the judgment of conviction and permit her to withdraw plea but did not appeal from the judgment itself. This Court, through Judge Denman, said, at p. 751:

“It is conclusively settled that a ruling upon a motion to vacate a judgment, made in the same term and in the same cause in which the challenged judgment is entered, is not an appealable order.” (Citing numerous cases).

These decisions simply mean that it is necessary to appeal from the judgment in order to present issues or matters interlocutory or ancillary or incidental thereto such as the motion here involved.

The Appellants, therefore, respectfully petition this Honorable Court to grant their petition for a rehearing, for the reasons herein stated and for the reasons stated in their briefs heretofore filed.

Respectfully submitted,

JOHN W. PRESTON and

SAMUEL MIRMAN,

By JOHN W. PRESTON,

Attorneys for Appellants.

Certificate.

We do hereby certify that, in our judgment, the foregoing petition for rehearing is well founded and we do further certify that said petition is not interposed for the purpose of delay.

JOHN W. PRESTON,

SAMUEL MIRMAN,

Attorneys for Appellants.

No. 10542

United States
Circuit Court of Appeals
For the Ninth Circuit.

WESTERN UNION TELEGRAPH COMPANY,
a corporation,

Appellant,

vs.

I. BROMBERG,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

OCT 7 - 1943

PAUL P. O'BRIEN,
CLERK

No. 10542

United States
Circuit Court of Appeals
For the Ninth Circuit.

WESTERN UNION TELEGRAPH COMPANY,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF
ATTORNEYS OF RECORD:

SIMON, GEARIN, HUMPHREYS & FREED,

Failing Building,
Portland, Oregon

for Appellant:

WILBUR, BECKETT, HOWELL & OPPEN-
HEIMER, ROBT. R. MAUTZ,

Board of Trade Building,
Portland, Oregon

for Appellee.

In the District Court of the United States
for the District of Oregon

July Term, 1942

Be It Remembered, That on the 16th day of September 1942, there was duly filed in the District Court of the United States for the District of Oregon, a complaint in words and figures as follows, to wit: [1*]

In the District Court of the United States
for the District of Oregon

Civil No. 1389

I. BROMBERG,

Plaintiff

vs.

WESTERN UNION TELEGRAPH COMPANY,
a corporation,

Defendant

COMPLAINT

The plaintiff complains of the defendant and for cause of action alleges:

I.

That at all times herein mentioned the defendant was and is a foreign corporation, duly authorized to transact business in the State of Oregon and is transacting business in said State as a telegraph company and with its principal office and place of business in

*Page numbering appearing at foot of page of original certified Transcript of Record.

the City of Portland, Oregon; that in connection with its business in the State of Oregon the defendant employed numerous persons to pick up and deliver messages and packages; that at all times herein mentioned, one Genevive Cline was employed by the defendant as a messenger and among other things, picked up and delivered messages for the defendant at hotels and business houses in the downtown district of Portland, Oregon and that at the time of the accident hereinafter referred to the said Genevive Cline was acting in the course of her employment for the defendant and in the furtherance of its business.

II.

That on the first day of June, 1942 and prior thereto the plaintiff resided at the Congress Hotel in Portland, Oregon and on said date was standing behind the said Genevive Cline near the main desk of said hotel in the lobby thereof awaiting [2] his turn to ask for his mail. That said Genevive Cline, then and there acting for and on behalf of the defendant, carelessly, recklessly and negligently made a sudden and abrupt turn from said desk and walked directly into and against the plaintiff, knocking him to the floor of said hotel lobby and causing the injuries hereinafter described.

III.

As a direct and proximate result of the carelessness, recklessness and negligence of the defendant through its said employee as aforesaid the plaintiff sustained a fracture of the neck of the right femur with external rotation of the distal fragment and

some coxavara and was caused to suffer physical pain and mental anguish and to become lame and disabled and was required to be hospitalized and to be attended by physicians and to be operated upon, and the plaintiff has been disabled and under medical treatment and hospitalized ever since and will be for an indefinite time in the future all to his general damage in the sum of \$7500.00.

IV.

That by virtue of said injuries the plaintiff has been caused to incur expenses for hospital, nursing, physicians, x-rays, rest home, ambulance and wheelchair in the sum of \$1,413.70 to date which the plaintiff claims as special damages.

V.

That this controversy is between citizens of different states and the amount involved exceeds the sum of \$3000.00, exclusive of interests and costs.

Wherefore, plaintiff prays judgment against the defendant for the sum of \$7500.00, general damages and the further sum of \$1,413.70, special damages and for his costs and disbursements herein incurred.

WILBUR, BECKETT,

HOWELL & OPPENHEIMER

By: ROBERT T. MAUTZ

Attorneys for Plaintiff

1001 Board of Trade Building

Portland, Oregon

[Endorsed]: Filed September 16, 1942. [3]

And Afterwards, to wit, on the 2nd day of March, 1943, there was duly Filed in said Court, an amended answer in words and figures as follows, to wit : [4]

[Title of District Court and Cause.]

AMENDED ANSWER

Defendant answers the complaint as follows :

FIRST DEFENSE

I.

Admits the allegations of paragraph I.

II.

Answering paragraph II, admits that portion thereof down to and including the word "mail" in line 1 on page 2; and denies the remainder of said paragraph.

III.

Denies the allegations of paragraph III.

IV.

Answering paragraph IV states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph, and therefore denies the same.

V.

Admits the allegations of paragraph V.

SECOND DEFENSE

The plaintiff was guilty of negligence which contributed to and proximately caused any injuries

which he may have suffered at the time and place complained of, in that he carelessly and negligently, without warning or notice of any kind to the messenger Genevieve Cline, placed himself in and remained in such a position in relation to her as to cause her to come in contact with him when she turned to leave her position at the desk at the Congress Hotel. [5]

Wherefore defendant prays that plaintiff take nothing by his complaint and that defendant have judgment for its costs and disbursements.

SIMON, GEARIN,
HUMPHREYS & FREED
EDGAR FREED

Attorneys for Defendant
1111 Failing Building
Portland, Oregon

State of Oregon
County of Multnomah—ss.

Due service of the within Amended Answer is hereby accepted in Multnomah County, Oregon this 2nd day of March, 1943 by receiving a copy thereof, duly certified to as such by Edgar Freed of Attorneys for Defendant.

ROBERT T. MAUTZ
Of Attorneys for Plaintiff

[Endorsed]: Filed March 2, 1943. [6]

And Afterwards, to wit, on Thursday, the 11th day of March, 1943, the same being the 10th Judicial day of the Regular March Term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [7]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

APPEARANCES

Attorneys for plaintiff:

Robert T. Mautz (Wilbur, Beckett, Howell
& Oppenheimer).

Attorneys for Defendant:

Edgar Freed (Simon, Gearin, Humphreys
& Freed).

NATURE OF ACTION

This is an action to recover damages for personal injuries sustained by the plaintiff through the alleged negligence of the defendant acting by an employee.

STATEMENT OF THE CASE

On the 1st day of June, 1942, the plaintiff, an elderly man, resided at the Congress Hotel in Portland, Oregon. On said date the defendant employed one Genevieve Cline, among others, as a messenger in Portland, Oregon. In connection with her duties for the defendant, the said Genevieve Cline picked up

and delivered messages for the defendant at hotels and business houses in the downtown district of Portland, Oregon.

On the date aforesaid, the said Genevieve Cline, while engaged in the scope of her duties for the defendant, was standing at the main desk in the lobby of said Congress hotel, either picking up or delivering a telegram or other message of some sort. The plaintiff at said time was standing to the rear of the said Genevieve Cline, either directly behind her or a bit to one side, and was waiting to step to said main desk and ask for his mail. [8] After leaving her position at said hotel desk, as aforesaid, the said Genevieve Cline came in contact with the plaintiff following which he fell to the floor of the lobby of said hotel.

CONTENTIONS OF PARTIES

The plaintiff contends that he was knocked to said floor by the said Genevieve Cline who was then and there acting for the defendant and that when the said Genevieve Cline made a sudden and abrupt turn from said desk and walked directly into the plaintiff, knocking him to the floor she was guilty of negligence which was the proximate cause of the injuries suffered by the plaintiff.

The plaintiff contends that as a proximate result of the negligence of the defendant the plaintiff suffered a fracture of the neck of the right femur with external rotation of the distal fragment and some coxavara, and that he was caused to suffer physical

pain and mental anguish and to become lame and disabled, and that he was required to be hospitalized and attended by physicians and to be operated upon to his general damage in the sum of \$7500.00.

The plaintiff contends that by reason of said injuries he has been caused to incur expenses for hospital, nursing, physicians, X-rays, rest home, ambulance and wheel-chair in the sum of \$1413.70.

The defendant denies that the plaintiff was knocked to the floor by said Genevieve Cline; denies that said Genevieve Cline turned abruptly or was negligent; and affirmatively contends that the plaintiff was guilty of contributory negligence in placing himself in a position closely behind and beside said Genevieve Cline without any notice or warning to her.

And the defendant contends that as a matter of law it would not be liable to the plaintiff even if its said messenger negligently walked into plaintiff, as the plaintiff contends, because the Congress hotel is a public place at which the messenger [9] was present in the exercise of a public right and was using only her body and not any vehicle or instrumentality furnished by the plaintiff.

The defendant denies on information and belief that the plaintiff was generally damaged or specially damaged.

ADMITTED FACTS

1. It is admitted that defendant is a foreign corporation duly authorized to transact business in the State of Oregon and that it is transacting business in said state as a telegraph company with its principal

office and place of business in Portland, Oregon, and that in connection with its business in said state it employs numerous persons to pick up and deliver messages and packages.

2. It is admitted that at the time of the accident herein involved the plaintiff was a resident of the Congress Hotel, that at said time Genevieve Cline was employed by the defendant as a messenger to pick up and deliver messages, and at said time was in the course of picking up or delivering a message for the defendant.

3. It is admitted that on the 1st day of June, 1942, the plaintiff was standing behind and a little to the side of the said Genevieve Cline near the main desk of the Congress Hotel in the lobby thereof waiting to ask for his mail, and that after the said Genevieve Cline left her position at said desk there was a contact between her and the plaintiff.

4. It is admitted that the controversy herein is between citizens of different states and that the amount involved exceeds the amount of \$3000, exclusive of interests and costs.

ISSUES TO BE DETERMINED

1. Was the defendant, through its employee, guilty of negligence which proximately caused the accident in question?

2. Was the plaintiff guilty of negligence which proximately caused or contributed to cause the accident in question?

3. Would the defendant be liable for injuries caused by its messenger's walking into plaintiff even

if she did so negligently and the plaintiff was not guilty of contributory negligence? [10]

4. What are the nature and extent of the injuries suffered by plaintiff by reason of said accident?

5. If the plaintiff is entitled to recover, in what amount has he been damaged, both generally and specially?

LIST OF PRE-TRIAL EXHIBITS

- Plt's 1 - 8 Eight X-rays marked on first Pretrial.
9-10 Two impeaching documents sealed.
11-12 Two X-rays.
13 Deposition Genevieve Cline.
Deft's 14 Deposition of I. Bromberg.
15 Original complaint.
Plt's 16 Original answer.

Defendant was, by the Court, permitted to, and did, amend its answer by adding a defense of contributory negligence.

Based upon hearing before this court and the court being fully advised in the premises, it is hereby

Ordered that the foregoing constitutes the pre-trial order in the above matter.

Dated this 11th day of March, 1943.

CLAUDE McCOLLOCH

Judge

State of Oregon

County of Multnomah—ss.

Due service of the within Pre-Trial Order is hereby accepted in Multnomah County, Oregon this . . . day of March, 1943 by receiving a copy thereof, duly

certified to as such by Edgar Freed of Attorneys for Defendant.

.....
Of Attorneys for Plaintiff

[Endorsed]: Filed March 11, 1943. [11]

And Afterwards, to wit, on Thursday, the 18th day of March, 1943, the same being the 16th Judicial day of the Regular March, 1943 Term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [12]

In the District Court of the United States
for the District of Oregon

No. Civil 1389

I. BROMBERG,

Plaintiff

vs.

WESTERN UNION TELEGRAPH COMPANY,
a corporation,

Defendant

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT.**

This matter came on duly and regularly for trial on the 11th day of March, 1943, before the Honorable Claude McColloch, Judge of the above-entitled court, sitting without the intervention of a jury.

The plaintiff appeared in person and by Robert T. Mautz (Wilbur, Beckett, Howell & Oppenheimer), his attorney, and the defendant by Edgar Freed (Simon, Gearin, Humphreys & Freed), its attorneys.

Evidence was introduced on behalf of the respective parties and the matter was submitted to the Court, who took the same under advisement, and having considered the same and being fully advised in the premises, makes the following:

FINDINGS OF FACT

I.

That on or about the first day of June, 1942, the defendant was and is a foreign corporation duly authorized to transact business in the State of Oregon and transacting business in said State as a telegraph company with its principal office and place of business in the City of Portland, Oregon; that in connection with its business in the State of Oregon the defendant employed numerous persons to pick up and deliver messages and packages; that on said date one Genevieve Cline was employed by the defendant as a messenger primarily for the purpose of picking up and delivering messages for the defendant at hotels and business houses in the downtown district of Portland, Oregon; that at the time of the accident herein involved the said Genevieve Cline was acting in the course of her employment for the defendant, within the scope of her duties as a messenger for the defendant and in the furtherance of its business. [13]

II.

That on said date and prior thereto the plaintiff, an elderly man, resided at the Congress Hotel, in Portland, Oregon. On said date the said Genevieve Cline while engaged in the scope of her duties for the defendant was standing at the main desk in the lobby of said hotel, either picking up or delivering a telegram or other message of some sort. The plaintiff at said time was standing to the rear of the said Genevieve Cline, either directly behind her or a bit to one side, and was waiting to step to said main desk and ask for his mail. After leaving her position at said hotel desk, as aforesaid, the said Genevieve Cline made an abrupt turn and walked directly into and against the plaintiff, knocking him to the floor of the lobby of said hotel.

III.

That the defendant by and through the said Genevieve Cline at said time and place was careless, reckless and negligent in abruptly turning from said hotel desk and walking directly into and against plaintiff. That there was ample and sufficient room and space for the said Genevieve Cline to have proceeded on her way in said hotel lobby without coming in contact with the plaintiff had she been keeping a proper lookout and exercising due care for the rights of others in said hotel lobby and particularly the plaintiff.

IV.

That at said time and place the plaintiff was not guilty of any negligence.

V.

As a direct and proximate result of the carelessness, recklessness and negligence of the defendant through its said employee, as aforesaid, the plaintiff sustained a fracture of the neck of the right femur with external rotation of the distal fragment and some coxa vera and he was caused to suffer physical pain and to become lame and disabled and he was required to be hospitalized and to be attended by physicians, and it was necessary for a major operation to be performed upon the plaintiff and for a large surgical pin to be inserted in the bones of the right hip in order to join and firmly fix the fractured portions thereof and ever since the date of said accident with the exception of two or three days the plaintiff has been confined to convalescent homes or hospitals [14] and he has suffered some permanent injury by reason of said injuries, all to his general damage in the sum of \$2500.00.

VI.

That by virtue of said injuries the plaintiff was caused to incur expenses for hospital, nursing, physicians, X-rays, rest homes, ambulance and wheel chair, as follows:

Hospital,	\$ 272.70
Nurses,	459.55
Doctors:	
Dr. Sidney Mayer,	150.00
Dr. Gilbert J. McKelvey	200.00
Dr. Leon Goldsmith,	3.50
X-rays,	12.00

Ambulance,	12.00
Wheelchair	6.00
Rest Homes,	1394.95
<hr/>	
Total—	\$2510.70

VII.

That prior to the accident aforesaid the plaintiff's board and room at the Congress Hotel cost him \$75 per month, and the special damages should therefore be reduced by the sum of \$750 and the Court thus finds that the plaintiff has been specially damaged by reason of said accident and the injuries aforesaid in the sum of \$1760.70.

Based upon the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

I.

That the plaintiff is entitled to have and recover judgment against the defendant in the sum of \$2500. as general damages and the sum of \$1760.70 as special damages.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court makes and enters the following

JUDGMENT

Now, Therefore, It Is Considered Ordered and Adjudged that the plaintiff, I. Bromberg, have and recover judgment against the defendant, Western Union Telegraph Company, a corporation, in the sum of \$2500 as general damages, and the further sum of \$1760.70 as special damages, together with

his costs and disbursements incurred herein to [15] be taxed by the Clerk, together with interest at 6% per annum on the foregoing from the date hereof and that execution issue therefor.

Dated this 18th day of March, 1943.

CLAUDE McCOLLOCH,
Judge

To the Western Union Telegraph Company, above-named defendant and to Simon, Gearin, Humphreys & Freed, and Edgar Freed, Defendant's attorneys:

You and each of you will please take notice that the plaintiff will present the foregoing findings, conclusions and judgment to the Honorable Claude McCulloch in his courtroom at 10:00 o'clock A. M. on Saturday, March 20, 1943.

ROBERT T. MAUTZ,
Of Attorneys for Plaintiff.

[Endorsed]: Filed March 18, 1943. [16]

And Afterwards, to wit, on the 16th day of June, 1943, there was duly Filed in said Court, a Notice of Appeal in words and figures as follows, to wit:

[17]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Western Union Telegraph Company, Defendant above named, hereby

appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this case on the 18th day of March, 1943, and from the whole thereof.

Dated this 15th day of June, 1943.

SIMON, GEARIN,
HUMPHREYS & FREED
EDGAR FREED

Attorneys for Appellant
Western Union Telegraph
Company

State of Oregon,
County of Multnomah—ss.

Service of the within Notice of Appeal is hereby accepted in Multnomah County, Oregon, this 15th day of June, 1943, by receiving a copy thereof, duly certified to as such by Edgar Freed of Attorneys for Defendant.

Sgd. ROBERT T. MAUTZ,
Of Attorneys for Plaintiff.

[Endorsed]: Filed June 16, 1943. [18]

And Afterwards, to wit, on the 16th day of June, 1943, there was duly Filed in said Court, Supersedeas Bond in words and figures as follows, to wit: [19]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents, That we, The Western Union Telegraph Company, a corporation, as principal, and Glens Falls Indemnity Company, a corporation of the State of New York authorized to become surety upon appeal bonds, as surety, are held and firmly bound unto I. Bromberg, plaintiff in the above-entitled case, in the sum of Five Thousand (\$5,000.00) Dollars; for the payment of which we bind ourselves, our successors and assigns, jointly and severally, by these presents.

The condition of the foregoing obligation is such that,

Whereas, said The Western Union Telegraph Company, defendant in the above-entitled case, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment rendered against it and in favor of said I. Bromberg, plaintiff in the above-entitled case, on the 18th day of March, 1943;

Now Therefore, if said appellant shall prosecute said appeal to effect; or if it shall satisfy the judgment in full, together with costs, interest and damages for delay, in the event the appeal is dismissed or said judgment is affirmed; or if it shall satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, in the event said judgment is modified; then the above obliga-

tion shall be void; otherwise it shall remain in full force and effect. [20]

In Witness Whereof, The Western Union Telegraph Company has caused this instrument to be executed by its attorneys; and Glens Falls Indemnity Company has caused these presents to be executed by its duly authorized attorney-in-fact this 15th day of June, 1943.

THE WESTERN UNION
TELEGRAPH COMPANY
By SIMON, GEARIN, HUM-
PHREYS & FREED
Its Attorneys
GLENS FALLS INDEMNITY
COMPANY
By GEO. B. RODGERS
Attorney

[Seal]

Approved:

JAMES ALGER FEE
Judge

State of Oregon,
County of Multnomah—ss.

Service of the within Supersedeas Bond is hereby accepted in Multnomah County, Oregon, this 15th day of June, 1943, by receiving a copy thereof, duly certified to as such by Edgar Freed, of Attorneys for Defendant.

Sgd. ROBERT T. MAUTZ,
of Attorneys for Plaintiff.

[Endorsed]: Filed June 16, 1943. [21]

And Afterwards, to wit, on Tuesday, the 13th day of July, 1943, the same being the 8th Judicial day of the Regular July Term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [22]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE RECORD ON APPEAL AND DOCKET CASE
IN APPELLATE COURT

Based on the stipulation of the parties, it is ordered that the time for filing the record on appeal and docketing this action in the Circuit Court of Appeals be and it hereby is extended to and including the 10th day of September, 1943.

Dated the 13th day of July, 1943.

CLAUDE McCOLLOCH

Judge

[Endorsed]: Filed July 13, 1943. [23]

And Afterwards, to wit, on the 22nd day of June, 1943, there was duly Filed in said Court, a Designation of Contents of Record on Appeal in words and figures as follows, to wit: [24]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

The Western Union Telegraph Company, defendant above named, and the appellant in the appeal of the above entitled case to the Circuit Court of Appeals for the Ninth Circuit, hereby designates the following for inclusion in the Record on Appeal:

The complete record, proceedings and evidence in the said case, which shall include:

Complaint

Amended Answer

Pre-Trial Order

Transcript of Testimony

All Exhibits

Finding of Fact, Conclusions of Law, and Judgment

Notice of Appeal

Supersedeas Bond

Designation of Contents of Record on Appeal

SIMON, GEARIN, HUM-

PHREYS & FREED

EDGAR FREED

Attorneys for Appellant

Western Union Telegraph
Company

State of Oregon

County of Multnomah—ss

Due service of the within Designation of Contents of Record on Appeal is hereby accepted in

Multnomah County, Oregon this 17th day of June, 1943 by receiving a copy thereof, duly certified to as such by Edgar Freed of Attorneys for Defendant.

WILBUR, BECKETT, HOW-
ELL & OPPENHEIMER and
ROBERT T. MAUTZ

S. D.

of Attorneys for Plaintiff.

[Endorsed]: Filed June 22, 1943. [25]

And Afterwards, to wit, on Thursday, the 26th day of August, 1943, the same being the 45th Judicial day of the Regular July Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [26]

ORDER TO SEND ORIGINAL EXHIBITS TO
APPELLATE COURT

It is ordered that the clerk of this Court send to the United States Circuit Court of Appeals for the Ninth Circuit, as a part of the Record on Appeal in this case, the original exhibits instead of copies thereof, except the original complaint (Exhibit 15) and the original answer (Exhibit 16) in which instances certified copies shall be sent.

Dated this 26th day of August, 1943.

JAMES ALGER FEE

Judge

Consented to:

ROBERT T. MAUTZ

Of Attorneys for Plaintiff

EDGAR FREED

Of Attorneys for Defendant

[Endorsed]: Filed August 26, 1943. [27]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD

United States of America

District of Oregon—ss:

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered 1 to 28 inclusive constitute the transcript of record on appeal from a judgment of said court in a cause therein numbered Civil 1389, in which I. Bromberg is Plaintiff and Appellee, and the Western Union Telegraph Company, a corporation, is Defendant and Appellant; that said transcript has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

I further certify that I am transmitting with the said transcript the duplicate of the reporter's transcript filed in the clerk's office.

I further certify that I am transmitting to the Circuit Court of Appeals for the Ninth Circuit, pursuant to an order of the District Court of the United States for the District of Oregon, exhibits Nos. 1 to 16 inclusive.

I further certify that the cost of the foregoing transcript is \$7.90, and \$5.00 for filing Notice of Appeal, making a total of \$12.90 which has been paid by the appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 4th day of September, 1943.

[Seal] LOWELL MUNDORFF, Clerk.

By F. L. BUCK

Chief Deputy [28]

Civil Action No. 1389.

[Title of District Court and Cause.]

TRANSCRIPT OF EVIDENCE

Portland, Oregon, Thursday, March 11, 1943.

10:00 o'Clock A. M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Wilbur, Beckett, Howell & Oppenheimer (By
Mr. Robert T. Mautz),

Attorneys for the Plaintiff;

Simon, Gearin, Humphreys & Freed (By Mr.
Edgar Freed),

Attorneys for the Defendant.

PROCEEDINGS [1*]

Mr. Freed: If your Honor please, maybe you are already familiar with the lobby of the Congress Hotel; I don't know whether you have seen it or not; if not, I suggest that it might be of advantage to the Court at some time to look at the scene of this accident. Whether you prefer to do it before or subsequently I would not know. I would think it would be helpful, though.

The Court: I will walk through at *at* the noon hour. [2]

* Page numbering appearing at top of page of original Reporter's Transcript.

PLAINTIFF'S EVIDENCE

MRS. I. E. HERVIN

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Mautz:

Q. Your name is Mrs. I. E. Hervin?

A. Yes.

Q. What is your given name?

A. Carrie B. Hervin.

Q. Your husband is local manager of the Metropolitan Life Insurance Company? A. Yes.

Q. The plaintiff is your father, I believe?

A. Yes.

Q. Mrs. Hervin, what was your father's condition prior to this acci- [3] dent in June of 1942?

A. Well, my father used to attend his office quite regularly, going down there by himself, and he was very active in many organizations.

The Court: Hadn't you better sit by him? He seems to be a little nervous.

The Witness: Yes. Just sit down by him? Could I sit here?

The Court: It would be better.

The Witness: All right. He was very active in organizations, attended meetings, conducted meetings, and he wasn't what I would call strong. He used a cane and depended on us often to give him our arm if he walked any distance, but he

(Testimony of Mrs. I. E. Hervin.)

was able to conduct his affairs, and did, as I said, go to his office, oh, I would say about three times a week.

Q. How old is your father?

A. He is eighty-seven.

Q. And was he doing the things that you have mentioned right along up until the time of this accident?

A. Yes. I wouldn't say that he attended office regularly.

Q. I understand.

A. I don't mean to imply that. But he did go and look over his books, and he knew his accounts and kept in touch with his clients and that sort of thing.

Q. Where did he live prior to this accident?

A. He lived at the Congress Hotel. [4]

Q. And did he require anyone to live there with him?

A. No.

Q. He lived there alone?

A. Yes.

Q. What had been your father's business?

A. He was in the insurance business.

Q. And for a good many years?

A. Yes, for a good many years.

Q. In Portland?

A. In Portland.

Q. And did he still maintain an office at all before the accident?

A. Yes. He was with the Insurance Service Company, and he had maintained his desk with them. He had his desk in the office.

Q. I suppose, of course, he was quite inactive in business at that time?

(Testimony of Mrs. I. E. Hervin.)

A. Yes. He just kind of looked over his correspondence there and he took care of the accounts he had. I don't think he solicited any new business.

Q. And where was his office?

A. He was—let's see. Is it in the Corbett Building? It is the Insurance Service. It is on Fifth and Morrison.

Q. How did he get from the Congress Hotel to his office and back again?

A. He generally walked. On occasions he took a taxi but very rarely. [5]

Q. Does he have any other children in the city besides yourself? A. Yes.

Q. And state whether or not he would get to your home frequently for meals and things like that.

A. Oh, yes, he did, very frequently. He was at my house, oh, at least once, more often twice, a week, and at the others——

Q. What was his mental condition at that time as to being able to remember and tell what was going on, and things of that kind?

A. He was very alert.

Q. He was very alert? A. Very alert.

Q. Now what change, if any, has there been in your father's condition since the date of the accident?

A. Well, there is a very perceptible change in his whole mental attitude. He forgets an awful lot. He doesn't seem to remember nearly the things that he did. In fact, the thing that seems

(Testimony of Mrs. I. E. Hervin.)

to bother him most is that he does not remember and it concerns him and worries him most. And of course physically he is not in the condition he was then, either.

Q. What is his ability to get around, and so on, by himself?

A. Oh, that is utterly impossible.

Q. Where has he been living since the accident?

A. Immediately after he left the hospital he went to the Bellvilla Sanitarium and lived there some time; then he thought again he would like to try to live in the hotel and be alone, so we gave him the [6] opportunity because he was so persistent, to go to the Campbell Hotel. It is a family hotel. He was there about two days, maybe three, and we found it impossible. Then we moved him to the Gard Convalescent Home, where he has been ever since.

Q. In other words, he was immediately taken to the hospital? A. Yes.

Q. Then he went to the Convalescent Home on the East Side? A. Yes.

Q. Then you gave him an opportunity to try to resume his former mode of living in a hotel which he was able to do just two or three days?

A. Yes.

Q. And continuously since then he has been at the Gard Convalescent Home, which is at Eighteenth and Johnson? A. Yes.

Q. Has he ever been in his office since the accident? A. Oh, no.

(Testimony of Mrs. I. E. Hervin.)

Q. He has not? A. No.

Q. Is his ability of locomotion as good now as it was before, as you observe?

A. Oh, no. He just hardly will attempt to move without some help.

Q. So far as you know, has he ever gone out in the streets, in the public, on the sidewalks and streets, and walked by himself since the accident?

A. Oh, no. [7]

Q. Never once?

A. Not by himself. I have walked him about a half a block or so.

Q. Let me ask you this question, Mrs. Hervin; whether it is technically and strictly proper I don't know; but he told you—I am not going to ask her what he told her—he told you how the accident happened after it occurred, did he? A. Yes.

Q. Now what is his ability at this time to tell you how the accident happened as compared with his ability shortly after it occurred?

A. I don't think it could compare at all. He seems to be so concerned that he will forget that he does forget.

Q. I see. Mrs. Hervin, have you been more or less in charge, either of paying for him or looking after the bills that he has had as a result of this accident? A. Yes, I did generally.

Q. Now state whether or not he had any special nurses immediately after the accident?

A. Oh, he had three nurses constantly for about—at least two weeks.

(Testimony of Mrs. I. E. Hervin.)

Q. You don't know the exact period of time he had those, do you?

A. No. But had I known the question was going to be asked I could have been more specific about it.

Q. But he had three nurses every day for you think around two weeks? [8]

A. Oh, I am sure it must have been that.

Q. Then how many special nurses?

A. Then he had two nurses, then gradually we got him to one; then when he went to the Convalescent Home his nurse stayed with him about a week; then we got practical nurses to stay with him.

Q. Now do you know what the total sum was that was paid for special nurses for your father as a result of the accident?

A. I did jot that down. \$459.55.

Q. What hospital was your father confined in?

A. St. Vincent's.

Q. What was his hospital bill?

A. \$272.70.

Q. And what doctors attended your father?

A. Dr. Sidney Mayer, Jr.; Dr. McKelvey was the surgeon; Dr. Leon Goldsmith came in just as, oh, sort of a consultant.

Q. I understand Dr. Goldsmith had been your father's attending physician for a number of years?

A. Yes.

Q. Before Dr. Sidney Mayer came into your

(Testimony of Mrs. I. E. Hervin.)

family, and then he started taking care of your father; is that right?

A. Yes, that is right.

Q. And Dr. McKelvey, who is an orthopedist with the Portland Clinic, is the one who performed the operation on your father, I think?

A. Yes, sir.

Q. Dr. Goldsmith just saw your father once?

[9]

A. That is right.

Q. Do you have the bills of those three doctors?

A. I had the bill of Dr. McKelvey, and I had the bill of Dr. Goldsmith, and in sending checks to them I mailed the bills back and didn't ask them to return them, but I do have canceled checks in some instances.

Q. I didn't mean the physical bills. What was Dr. McKelvey's charge?

A. Oh. Two hundred dollars.

Q. Dr. Goldsmith's?

A. Three dollars and a half.

Q. Dr. Mayer's?

A. Dr. Mayer's bill was one hundred and fifty dollars.

Q. Now the hospital bill that you mentioned included some x-rays, then I think you paid for some subsequent x-rays; is that true?

A. Yes.

Q. What did you pay subsequently for x-rays?

A. Twelve dollars.

(Testimony of Mrs. I. E. Hervin.)

Q. Twelve dollars. What did you pay for rest home for your father up to the time that we filed this complaint? A. \$297.95.

Q. And what have you paid for rest home for your father since that time?

A. At the Bellvilla it was four hundred and thirteen dollars, and at the Gard Convalescent, where he has been for the past five months or more, it was seven hundred and two dollars, which makes [10] there a total of eleven hundred and fifteen.

Q. \$1115 has been paid for convalescent homes subsequent to the filing of the complaint, in which we listed the special damages up to that time?

A. Yes.

Q. Do you know at what rate these rest home charges were made?

A. Well, when he went to the Bellvilla the rate was \$5.00 a day, and then with the increase in the cost of help and everything, at least so we were told, she raised it to six. The Gard Convalescent Home was six and a half a day.

Q. I see. Now about what was your father's average expense for board and room at the Congress Hotel per month?

A. I don't think it was ever beyond seventy-five collars.

Q. In other words, you think that for \$75.00 he got board and room himself?

A. Yes; because of the fact that he was able

(Testimony of Mrs. I. E. Hervin.)

to get around and came to our home so much for meals. Of course that made quite a difference.

Q. You have been familiar with your father's affairs for many years, have you?

A. More or less.

Q. And then you paid out something for ambulance and wheel chair?

A. Yes. The ambulance was \$12.00, and a wheel chair was \$6.00.

Mr. Mautz: I believe you may inquire.

Cross Examination [11]

By Mr. Freed:

Q. Mrs. Hervin, how long had it been prior to this accident since Mr. Bromberg had actively attended to his business?

A. Oh, I could not tell you definitely, Mr. Freed.

Q. Had it been months, I mean, or years?

A. Oh, yes. He just gradually tapered off. He did attend to his business, and he did, I would think, in the last few years occasionally solicit some new business, but it was generally from old friends or some one. But he did take care of it; he did take care of his accounts, and he did go and look them over and go and see his clients from time to time or keep in touch with them by the telephone.

Q. He used the telephone, you say?

A. Yes, sir.

(Testimony of Mrs. I. E. Herwin.)

Q. His impaired hearing didn't affect that?

A. Not so much. It became increasingly difficult for him as time went on for the last—oh, for the past few months before his accident it was harder for him.

Q. Well, his activities were impaired then prior to the accident?

A. Well, more or less, only to the extent that he wasn't—I don't say physically active. I mean his movements were not quick, but he did manage to go around; he did manage to attend meetings, and he did manage to go to his office.

Q. Those were meetings of civic organizations you speak of?

Q. Well, yes; and educational organizations he was interested in. [12]

Q. Public meetings?

A. Well, yes, they were public meetings.

Q. Do you have any idea how much approximately Mr. Bromberg weighed on June 1st of last year when this accident occurred?

A. I really could not say, but I would say he would be, just venturing a guess—

Q. Was he about the same weight that he is now, would you think?

A. I think he has lost a little weight. I wouldn't say, because sometimes his face looks fuller and I really could not say, but I think he has lost some weight.

Q. Would you say very much?

(Testimony of Mrs. I. E. Hervin.)

A. He was never a heavy man. I really wouldn't want to say definitely.

Q. Probably generally about the same in weight?

A. He is a little thinner.

Q. I don't want to ask you about his condition, because I don't think you know.

A. Well, yes. I think he is thinner, definitely thinner.

Q. His height I imagine is approximately the same? A. I imagine so. I don't know.

Q. Now prior to the accident Mr. Bromberg walked with a sort of a shuffling or dragging of his feet, didn't he? A. Sometimes.

Q. The gait and the movements which he exhibited in coming up to the chair that he has were not due entirely to this accident, [13] were they?

A. No, I wouldn't say entirely.

Q. He walked at that time, that is, prior to the accident, like an old gentleman? A. Yes.

Q. Now who made any arrangements that had to be made respecting Mr. Bromberg at the Congress Hotel?

A. What kind of arrangements do you mean?

Q. Well, as to keeping him there.

A. He made his own arrangements.

Q. Did the Congress Hotel ever communicate with you respecting Mr. Bromberg?

A. No, I don't—you mean with respect to his business, or anything of that sort?

Q. No; with respect to their keeping him at the hotel. A. Oh. Oh, yes, they did.

(Testimony of Mrs. I. E. Hervin.)

Q. That was how long prior to this accident?

A. Oh, a few months.

Q. A few months prior to the accident?

A. Uh huh.

Q. Do you recall who wrote you the letter for the hotel? A. Miss——

Q. Miss Troutwine? A. Miss Troutwine.

Q. She was one of the managers there? [14]

A. Yes. Uh huh.

Q. Did the hotel at that time—did she make any representations in that letter regarding Mr. Bromberg's physical condition, or did she ask you to call? A. She asked me to call.

Q. And did you call at the hotel?

A. Yes.

Q. And did she suggest that Mr. Bromberg should not be left at the hotel unattended?

A. Yes, she did. She suggested that—she suggested that his movements were slow; that when he came to the elevator they had to wait; it was an inconvenience to some of the other patrons of the hotel, and that she thought it would be better probably if he stayed in a hotel that wasn't a commercial hotel.

Q. But nothing came of that? You didn't take him out? A. No.

Q. Were there any modifications as a result of that meeting, were there any modifications made in Mr. Bromberg's stay at the hotel?

A. Yes; in that he had his breakfast in his room, because he was in the habit of getting up late in the

(Testimony of Mrs. I. E. Hervin.)

mornings and came down for breakfast at about noon, which was a very busy hour in the Coffee Shop, and so we arranged that he had his breakfast—and his movements were slow—we arranged that he have his breakfast in his own room.

Q. Was he having his breakfast in his room, did that arrangement [15] continue, until the time of the accident? A. Yes.

Q. And in this conversation the hotel did not complain to you that it was dangerous to leave Mr. Bromberg in the hotel there unattended?

A. I don't remember that they said it was dangerous.

Q. Well, did they indicate that it wasn't safe for him to be left there unattended in the hotel?

A. Well, they indicated to me that his movements were pretty slow and that he probably would be better where there was some one to watch him and care for him.

Q. Well then, their complaint to you then wasn't entirely, was it, Mrs. Hervin, on the ground that he slowed up things?

A. Well, as I recall it, Mr. Freed, it seems to me as though it was largely that.

Q. In the conversation or in the complaint she made, didn't it have some aspect of it not being entirely safe for Mr. Bromberg to be in the hotel unattended?

A. Well, they said he might be inclined to stumble over something. Yes, they did say that.

(Testimony of Mrs. I. E. Hervin.)

Q. And as a result was he just to have his breakfast or his other meals in the room?

A. Well, he was to have his breakfast, because he seldom ate dinners there. He seldom did have his meals there. He would go down in the afternoon and have a cup of tea or a cup of coffee. [16]

Q. But growing out of the conversation wasn't it understood between you and the hotel that he would not leave his room for meals?

A. Oh, no, I didn't understand that, because he did leave his room for meals and he had to go to restaurants around.

Q. Now he was not taken out of the hotel——

A. No.

Q. ——because he was there at the time of the accident? A. Yes.

Q. That \$75.00 that you said it cost him to stay at the hotel, was that a monthly amount that he paid the hotel?

A. Well, there was no regular amount. He paid, I don't recall exactly, I think it was thirty-six or something like that, dollars for his room, and the meals that he ate there.

Q. Whatever they came to?

A. Yes. Uh huh.

Q. You would not know exactly?

A. But I know pretty certain that his expenses did not as a rule exceed seventy-five dollars a month.

Q. Well, it was his room—— A. Yes, sir.

Q. ——plus whatever his food came to?

A. Yes.

(Testimony of Mrs. I. E. Hervin.)

Q. And there was no other sum paid to the hotel, in other words, for an attendant for Mr. Bromberg?

[17]

A. Oh, no; just for his room service.

Q. And that was the fair sleeping and eating charge?

A. That is right.

Q. If any attendant had been necessary that was not included in that seventy-five dollars?

A. No. There hadn't been any necessary.

Q. No, that is right. Now you say that after the accident Mr. Bromberg was able to tell you pretty clearly how the accident happened?

A. Oh, he was pretty excited and he said——

Q. You can't tell what he said to you.

A. Well, I could tell.

Q. I mean I am not asking you to tell.

A. Uh huh.

Q. You stated in answer to Mr. Mautz' question——

A. Yes.

Q. ——that he was able to give you a statement of the accident.

A. A clearer statement then than he can now.

Q. How long after the accident was that that you speak of?

A. Oh, I was there I think very shortly after.

Q. Oh, you mean a statement he made on the day of the accident?

A. Yes. Is that what you mean?

Q. Well, I wanted to find out what you meant.

A. Yes; yes.

(Testimony of Mrs. I. E. Hervin.)

Q. And subsequently did he discuss the accident with you? [18] A. Oh——

Q. And tell you how it happened?

A. Occasionally.

Q. Was he just as clear on the subsequent occasions soon after that as he was the first time?

A. Yes, soon after that he was.

Q. But as time went on since then he has grown more vague?

A. We really haven't discussed the accident with him too much, and it was only recently when he came here the last time that we had an occasion to realize that he couldn't give us clear stories as he had been giving us.

Q. Well, you were present when Mr. Bromberg's deposition was taken? A. Yes.

Q. In the Federal Court? A. Yes.

Q. And I would just like to ask you this question: Did Mr. Bromberg's version of the accident as given in his deposition coincide with the version he gave you soon after the accident?

A. Well, not exactly in detail, because when he said something about pushing with the hand he told us, as he told us originally, it seems that she in turning got her hand on him, or something; in turning she knocked him over.

Q. Well, the two were not the same?

A. Not exactly.

Q. They were not? [19]

A. (Witness shakes her head.)

(Testimony of Mrs. I. E. Hervin.)

Q. Now Dr. Sidney Mayer, who was spoken of, is your son-in-law? A. Yes.

Q. He would be Mr. Bromberg's grand son-in-law? A. Yes.

Q. If there is such a word. And you say that Mr. Bromberg's apparent inability to tell about the accident really now appears to stem from his fear that he will forget about it?

A. Well, I don't know. I am no authority on that, but I do know——

Q. I thought that was what you said.

A. Well, it seems to me that would be it, because he is just obsessed with the fear that he is going to forget.

Q. I see. Does Mr. Bromberg have an attendant now, a private attendant?

A. Not private now, no; just nurses in the nurse's home.

Q. He is at the Gard home? A. Yes.

Q. That is a rest home? A. Yes.

Q. It is a home where elderly people and sick people are? A. Yes.

Q. There are rather elderly people there?

A. Mostly convalescents.

Q. Now, Mr. Bromberg is eighty-seven now, I believe? A. Yes. [20]

Q. Is he past eighty-seven or not?

A. He is past eighty-seven.

Q. When was he eighty-seven?

A. In July.

(Testimony of Mrs. I. E. Hervin.)

Q. Well then, he wasn't quite eighty-seven at the time of this accident? A. No.

Q. And you would not say that prior to the accident, immediately prior to the accident, that he was steady on his feet, would you?

A. Well, not as steady as a man younger but for a man of his years I think he did pretty well.

Q. Sure he did. I think he does well now. He used a cane, didn't he? A. Yes.

Q. Just as he does now? A. Yes.

Q. And I believe that you said that he walked along, as I am going to describe for want of a better way, his feet pushing along instead of stepping along?

A. Yes, at times; because at other times he would pick up his feet and walk along. When he don't walk and his feet shuffle he seems to be conscious of it and he says, "I am not walking as well as a baby", and he would seem to pick up his feet.

Q. Well, at the hotel they did complain in that conversation that [21] he walked rather slowly?

A. Yes.

Q. Through the hotel, then? A. Yes.

Mr. Freed: I think that is all.

Redirect Examination

By Mr. Mautz:

Q. Mrs. Hervin, does Mr. Bromberg's present inability to remember, his vagueness in some things of that kind, is it only about the accident or is it general? A. No. It is general.

Q. It is general? A. Uh huh.

(Testimony of Mrs. I. E. Hervin.)

Q. As distinguished from the alertness that he had mentally before the accident?

A. There is a great difference, a marked difference.

Mr. Mautz: That is all.

(Witness excused.)

SIDNEY MAYER, Jr.

was produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Mautz:

Q. You are Dr. Sidney Mayer, Jr.? [22]

A. Yes.

Q. Dr. Mayer, are you licensed to practice the profession of physician in this state?

A. Yes.

Q. Just briefly, Doctor, what has been your training?

A. I am a graduate from the University of Oregon Medical School in 1936. From 1936 to 1940 I served a medical internship at Johns Hopkins. 1940 and '41 I was Assistant Professor of Medicine at the University of Oregon Medical School, and since 1941 I have been in private practice.

Q. You are a son-in-law of Mrs. Hervin, who just testified? A. Yes.

Q. Were you called to attend Mr. Bromberg.

(Testimony of Sidney Mayer, Jr.)

Mrs. Hervin's father, after his fall in June of 1942?

A. Yes.

Q. Where did you first see Mr. Bromberg?

A. In his hotel room.

Q. And what was his condition then?

A. He was lying back in bed, complaining of pain in his right hip, and gave the classical signs of fracture of the head of the right hip bone.

Q. What did you do with him?

A. I called Dr. Gilbert McKelvey, who is an orthopedic surgeon, and made arrangements to have him transferred immediately to St. Vincent's Hospital. [23]

Q. And subsequently at your request and in connection with your attendance upon him as attending physician, were X-rays taken? A. Yes.

Mr. Mautz: And would you hand the witness the X-rays, Mr. Joy, please.

Q. Would you select the X-rays that were first taken, Doctor? Would you care to see them in this machine or not?

The Court: Do you want him to point this out on the machine?

Mr. Mautz: Well, only if your Honor would be interested in it.

The Court: Just as you wish.

Mr. Mautz: They do demonstrate the fractures.

The Court: Where are the fractures?

A. In the head of the right femur.

Mr. Mautz: Q. And that is where, Doctor, from a layman's viewpoint, in the hip?

(Testimony of Sidney Mayer, Jr.)

A. Yes. It is in the hip bone, the upper part of the thigh bone just where it joins the head of the femur.

The Court: I wouldn't need to see them.

Mr. Mautz: All right.

Q. What type of fracture was that?

A. I am no expert orthopedic surgeon, but I believe it is what is called an intra-capsular fracture.

The Court: That is what is commonly called a hip fracture?

Mr. Mautz: A hip fracture?

The Court: Yes, with the usual kind of surgery. [24]

Q. You mentioned some coxa vara; what does that mean?

A. It means external rotation. In my note in that report I was quoting the X-ray reading at the St. Vincent's Hospital.

Q. That means a rotation of the bone to some extent? A. Yes.

Q. Now what type of an operation was performed on Mr. Bromberg?

A. Dr. McKelvey performed a pin operation, whereby the broken fragments were put together with the aid of a metal pin.

The Court: What anesthetic?

Mr. Mautz: Q. What kind of anesthetic was used?

A. I don't know. I wasn't present at the time of the operation.

Q. Aren't you familiar in your practice—

(Testimony of Sidney Mayer, Jr.)

A. No.

Q. Doctor, would you consider that a minor operation or not? A. No.

Q. On a man seventy-eight?

A. That is a major operation.

Q. Ordinarily what type of anesthetic is used for that type of operation?

A. I really could not say. I don't know. I am not a surgeon.

Q. What kind of a pin is used for that kind of an operation?

A. It is called a Smith-Peterson pin. It is a specially treated metal pin.

Q. About what size?

A. Well, that was demonstrated in the X-ray picture. [25]

Q. Would you demonstrate that, please, to the Court.

(Witness places film in illuminator.)

Q. Now generally where was the fracture?

A. Well, this film was taken after the healing process was well under way, and the fracture is roughly in this area.

Q. You say that was taken after the healing process was well along?

A. Yes. This was taken while he was in the rest home on the East Side, as a checkup to note whether healing was sufficient to allow him to get on his feet.

Q. Point out the pin you have mentioned.

(Testimony of Sidney Mayer, Jr.)

A. That is the pin—this heavy white object.

Q. Does that demonstrate its actual size?

A. Yes.

Q. Is that pin still in Mr. Bromberg's hip?

A. Yes.

Q. Will it always be? A. Yes.

Mr. Mautz: I believe that is all on that point.

Q. It has been testified by Mrs. Hervin, Dr. Mayer, that for some time following the accident three special nurses were called for Mr. Bromberg, then for a period two, and then subsequently one. Were those special nurses called under your supervision? A. Yes.

Q. You felt it was necessary for him to have them, did you? [26] A. Yes.

Q. And she has testified, or if she hasn't I perhaps didn't ask her, and I will ask you if the charges they made for their services were at the rate of six dollars per day of eight hours is that the regular charge for special nurses? A. Yes, it is.

Mr. Mautz: Do you have the hospital bill, Mrs. Hervin, of \$272?

Mr. Freed: I won't dispute that.

Mr. Mautz: Well, Mr. Freed will testify——

Mr. Freed: I will admit.

Mr. Mautz: ——will stipulate that that will be the reasonable charge for hospitalization.

Mr. Freed: If that is what you say it is.

Mr. Mautz: Yes. She has the bill, if you would like to see it.

Q. Dr. Mayer, she has testified that your bill

(Testimony of Sidney Mayer, Jr.)

was \$150.00 and that Dr. McKelvey's bill was \$200.00, and Dr. Leon Goldsmith, who attended the plaintiff some years ago called on him once at the hospital and his bill was \$3.50. In your opinion are those charges reasonable charges for the services that were rendered by those three physicians to the plaintiff? A. Yes.

Q. It has been testified here, Doctor, that following this hospitalization he was confined at a convalescent home on the East Side and then because of his own insistence he was permitted to go to a hotel for two or three days to see if he could handle it and [27] it was discovered he couldn't and since that time he has been confined at the Gard Convalescent Home. In your opinion, Doctor, has it been necessary for him to be confined to these convalescent homes since the accident? A. It has.

Q. And Mrs. Hervin has testified about the charges at these homes, that it was originally \$5.00 per day at the East Side convalescent home and then they raised to six, and the charge at the Gard Convalescent Home has been at the rate of \$6.50 per day. Within your knowledge and experience are those the regular and standard charges for institutions of those kinds in this community?

A. I believe they are.

Q. What was the eventual result of Mr. Bromberg's injury? What was the extent of his recovery?

A. I should say that so far as the function of his hip is concerned he has made a 90 per cent recovery.

(Testimony of Sidney Mayer, Jr.)

Q. And he has made, for his age and the consequent brittleness, I suppose, of bones and all, he has made a happy recovery, as far as the way those recoveries sometime go; isn't that true?

A. An unusually good recovery.

Q. An unusually good recovery. And you would say, as far as the actual function of the hip itself, it is probably 90 per cent as good as it was before?

A. Yes.

Q. You perhaps didn't actually weigh him, but judging by the [28] times that you have treated him and been with him and all, give us his approximate height and weight, would you, Doctor.

A. Well, it would be purely a guess. I should say he is five feet five or six inches tall, and weighs probably 130 pounds.

Q. Do you think he weighs that much?

A. That is a guess.

Q. You didn't have an occasion to weigh him, did you?

A. No.

Q. And would his weight be very much different at this time from what it was just before the accident?

A. No, I shouldn't say it is very much different.

Mr. Mautz: You may inquire.

Mr. Freed: No cross examination.

Mr. Mautz: Oh, excuse me.

Q. Mrs. Hervin testified that subsequent to the hospitalization additional X-rays were taken at an expense of \$12.00. Would those be standard and reasonable charges?

A. Yes.

(Testimony of Sidney Mayer, Jr.)

Q. And the charge for the ambulance service that was used for him was \$12.00, and the wheel chair that was used for him cost \$6.00. Are those standard charges for those items?

A. I am not at all familiar with the charge for wheel chair, but the other charges were standard.

Mr. Mautz: That is all, Doctor. Thank you very much.

(Witness excused.) [29]

I. BROMBERG,

the plaintiff, was thereupon produced as a witness in his own behalf and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Mautz:

Q. Mr. Bromberg, how old are you?

A. I am eighty-seven.

Q. And you lived in the Congress Hotel at one time, did you not? A. Yes. [30]

Q. Do you remember the day that you had an accident there? A. Sir?

Q. Do you remember the accident that you had in the Congress Hotel? A. Yes.

Q. Could you tell Judge McColloch here how it happened? A. Yes.

Q. You tell him, please. A. Yes.

The Court: Tell him to tell the reporter.

(Testimony of I. Bromberg.)

Mr. Mautz: Q. You just sit there and tell him how it happened.

A. Just let me think a minute. One day in June, while I lived at the Congress Hotel, I made about my customary trip every day to go downstairs to the counter, to the Clerk, to solicit my daily mail. That day I done the same thing. I went down stairs with this intention, to solicit my mail, if I have any, but I came to the counter of the clerk and I found there a young lady busy with the clerk soliciting her mail, so I waited until she will be—until she will be through. I stood right next to her, waited until she will be through; then it should be me next. Yes. Well now, about—there was something left out about that.

Q. You were waiting for your mail?

A. Well, yes.

Q. You said you were waiting for your mail but this young lady was ahead of you.

A. Yes. [31]

Q. All right. Then what happened?

A. And I stood there near the young lady, waited until it will come my next.

Q. And then what happened? A. Huh?

Q. And then what happened?

A. (After pause): Well, and in a short—well, I told you I stood next to the lady in order to get my next, and—(witness pauses).

Q. Did you have a fall after that?

A. Well—(witness pauses).

Q. Did you have a fall?

(Testimony of I. Bromberg.)

A. Yes. Just a moment.

Q. Oh, surely.

A. Well, I stood near that lady to wait, then she came close to me and just got a hold of my throat and pulled and gave me a forcible push and I fell with my floor—with my back to the floor and I broke my hip.

Q. All right. That is fine.

A. The consequence was after I had broken my hip they had to take me to my room then upstairs, and from my room they had to take me to the hospital and I was operated.

Q. Yes. That is fine.

Mr. Mautz: I want to say, as Mr. Bromberg's attorney, it is not our contention that this young lady took him with her hand. [32]

The Court: Are there any other eye witnesses?

Mr. Mautz: *Now* so far as I know, your Honor. You may inquire.

Mr. Freed: No cross examination.

Mr. Mautz: We will call Miss Genevieve Cline.

GENEVIEVE CLINE

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination [33]

By Mr. Mautz:

Q. Your name is Genevieve Cline?

A. Yes.

(Testimony of Genevieve Cline.)

Q. And how old are you? A. Seventeen.

Q. And in June of 1942 where did you work?

A. I at that time worked for the Western Union Company.

Q. And were you doing work at that time for someone else also?

A. I was working part time at school.

Q. Pardon, please?

A. I was working for the National Youth Movement at school.

Q. Weren't you working for the J. C. Penney Company?

A. Not at that time. I didn't start working for the J. C. Penney Company until January in 1943.

Q. Oh, I see. What were you doing in the Congress Hotel on June 1st, 1942?

A. I had been sent there by the company to either deliver or pick up a telegram, which I don't remember.

Q. You don't recall which? A. No.

Q. Did you have any insignia of any kind of the company on?

A. I don't recall, but I would say I was wearing a Western Union coat.

Q. Coat. However, you were there on the company business, were you? [34]

A. Yes, I was.

Q. That was the only reason you went to the Congress Hotel? A. Yes.

Q. Had you ever been at this hotel before?

A. No. I hadn't.

(Testimony of Genevieve Cline.)

Q. Never had. Where did you go to either pick up or deliver this message for the Western Union Company?

A. I went to the main desk.

Q. And when you finished at the main desk what did you do?

A. Oh, when I finished at the main desk I turned around to leave the hotel.

Q. And where was Mr. Bromberg at that time when you turned around?

A. Well, Mr. Bromberg was behind me and slightly to the side.

Q. About how far from you?

A. Well, I don't know exactly.

Q. Well, just your best judgment?

A. Oh, about two or three steps.

Q. Two or three steps?

A. Something like that.

Q. And then did you start moving away from your position at the desk?

The Court: I will tell you the best way to do that would be to show me. Mr. Joy, you come and stand behind her. You come down here and face like you were facing the desk. You just take any position there, a little further up. About how far behind [35] you? Where should he be?

A. He was a little closer than that, I would say. (Mr. Joy changes his position.) Mostly like that, yes.

The Court: About that way behind you, or a little more to your side?

(Testimony of Genevieve Cline.)

A. Just about like that, yes.

The Court: All right. Thank you.

Mr. Mautz: Q. And then when you moved away from the desk did you start running?

A. No, I didn't.

Q. You started walking? A. Yes.

Q. And was there a contact between you and Mr. Bromberg? You didn't know who the man was, did you? A. No, I didn't.

Q. But you have since found out it was Mr. Bromberg? A. Yes, I have.

Q. Was there a contact between the two of you?

A. I brushed against him.

Q. Now you say you brushed against him. What do you mean by that?

The Court: I want to know, first, whether you knew he was behind you all the time.

A. No, I didn't.

Mr. Mautz: Q. When you were standing at the desk doing your work there you didn't know that he was behind you? [36]

A. No, I didn't.

Q. Then when you turned around you saw him there two or three steps, or whatever the distance was behind you you saw him? You saw him behind you.

A. Well, I knew there was someone there when I brushed against him.

Q. When you turned around and left the desk you didn't close your eyes, did you?

(Testimony of Genevieve Cline.)

A. No.

Q. And as you have told the Court, he was standing almost immediately to your rear; isn't that true? A. That is true.

The Court: Did you realize there was an old gentlemen behind you? A. No, sir.

Mr. Mautz: Q. Did you realize it was a man, other than a woman? A. Well——

Q. Did you see enough of him to realize it was a man and not a woman? A. No.

Q. You didn't?

A. No. I just knew there was some one back—

The Court: Were there other people around there, do you know?

Mr. Mautz: I was just going to ask that, Judge.

Q. Was there anybody else in the vicinity?

A. No. [37]

Q. There wasn't anybody else there, was there?

A. No, sir.

Q. And it is quite a large area there in the lobby? A. Yes.

Q. In other words, there was plenty of room for you to have walked without having any contact with Mr. Bromberg, wasn't there?

A. Yes, there was.

Q. But then in walking away from the desk you did have a contact with him?

A. Yes, I did.

Q. And as a result of that contact he went to the floor, didn't he? A. Yes.

Q. And did you help him up?

(Testimony of Genevieve Cline.)

A. Well, I started to help one of the bell boys pick him up and then another one came to his assistance, so I left the hotel and came to the office.

Q. How many steps, in walking away from the desk how many steps, if any, do you think you took before you bumped into him?

A. Probably one.

Q. Probably one?

The Court: Do you remember whether you turned to the right or to the left?

A. No, I don't. [38]

The Court: You were through and were going out the door? That was your idea?

A. Yes.

Mr. Mautz: Q. And in addition to no people being around there there was no post or pillar right there in the vicinity that you were trying to avoid, was there? A. No, sir.

The Court: You say there were no eye witnesses. Didn't the Clerk see it.

Mr. Mautz: Nobody seemed to. Well, there were different ones around, the clerk, bell hops who saw things immediately afterwards, and who didn't see the actual impact, as I understand.

The Court: Who was the Clerk? She had been there talking to the Clerk.

Mr. Mautz: Who was that Clerk?

A. Well, I found out afterwards that the Clerk on duty was—I believe his name was Mr. Shelton.

Mr. Mautz: Mr. Shelton.

The Court: I don't see how it could happen

(Testimony of Genevieve Cline.)

without the Clerk seeing it. She was talking to the Clerk.

Mr. Mautz: Apparently, as I get it, your Honor, maybe Mr. Shelton is being brought here by Mr. Freed.

Mr. Freed: No.

Mr. Mautz: As I understand, after he had finished his business with this young lady he turned himself to do some other business [39] behind the desk. In other words, I haven't talked to him personally but I have seen a statement he gave a third party yet from either of us. That is the reason, I presume, neither of us has called him. He seemed to know nothing about it because he turned around.

The Court: Did he know Mr. Bromberg was there also?

Mr. Mautz: That I don't know.

Q. Now what, if any, statement did you make to Mr. Bromberg right afterwards?

A. Well, when I went to help the bell hop pick him up I told him I was sorry that I brushed against him.

Q. Now, Genevieve, didn't you tell him you were sorry that you knocked him down?

A. I don't know. I may have.

Q. You may have told him that. Uh huh. As a matter of fact, you did bump into him, didn't you?

A. Well, either bumped into him or brushed against him.

Mr. Mautz: Could I have the plaintiff's sealed exhibit?

(Testimony of Genevieve Cline.)

The Clerk: They haven't been opened yet.

Mr. Mautz: Is it permissible for me to open them?

The Court: Yes. Have you seen it, Mr. Freed?

Mr. Freed: I haven't.

Mr. Mautz: Well, this is a copy, if the Court please, of the witness' statement, the original of which was not in the city at the time that we had our pre-trial but the original of which is [40] now available and is under subpoena.

Mr. Freed: If this is a copy I won't object because you don't have the original.

Mr. Mautz: The original is available. I can get it if you want it.

Mr. Freed: Whatever you say. I won't require that expense. I am concerned if the witness recognizes it.

Mr. Mautz: Q. Genevieve, shortly after the accident happened a representative of the Congress Hotel got in touch with you and took your statement; is that not true?

A. That is true.

Q. They asked you what happened, you told them, they wrote it down and you signed it?

A. Yes.

Q. Would you read that copy, please, to see if that seems to be about what you remember you signed (passing paper to witness.)

A. Yes.

Mr. Freed: Well then, we make no objection.

Mr. Mautz: We will offer it in evidence.

The Court: What does it say? Read it.

(Testimony of Genevieve Cline.)

Mr. Mautz: I was just going to read it as soon as it was marked.

The Court: Read it first.

Mr. Mautz: "Genevieve Cline, residing at 2013 Northeast Fifty-eighth Street, Portland, Oregon, says: [41]

"That on June 1st, 1942, at about 3:30 P. M., I was in the lobby of the Congress Hotel in Portland. I was at the lobby desk and was either delivering or picking up a telegram. Upon turning around to leave I bumped into an old man near the desk. He fell down and I helped a bell boy pick him up. I told him I was sorry and then left the hotel. I did not realize he had been injured.

"I have read the above and it is true.

June 26, 1942."

Signed "Genevieve Cline."

(Reporter's Note: See pages 49 and 50 of this transcript where Mr. Mautz further offered the above statement and the Court reserved ruling.)

Q. Now in that statement taken just twenty-five or twenty-six days after the accident you did say at the time that you bumped into him and he fell down? A. Yes.

The Court: I wish you would tell me where you got that expression you used, you brushed into him. Did somebody tell you to say that? A. No.

The Court: You went to High School, didn't you?

(Testimony of Genevieve Cline.)

A. Yes. I am going to High School at the present time.

Mr. Mautz: Q. And I believe you say, Genevieve, that you don't recall now whether you told him immediately afterwards that you [42] were sorry that you knocked him down, or not?

A. No, I don't.

Q. You won't say that you didn't say that?

A. I won't say that I didn't.

Mr. Mautz: That is all.

Cross Examination

By Mr. Freed:

Q. When did you first realize that anybody, Mr. Bromberg, a man, or woman or child, or anybody was near you, back of you or to the side of you in the lobby?

A. Well, at the time I either brushed against or bumped into him.

Q. When you came in contact with him?

A. Yes.

Q. Up to that time you had not realized that anybody was there? A. No.

Q. Now whether we call it bumped into, as Mr. Mautz does, or brushed, as you have from the stand, tell the Judge what did happen. I mean, what was the contact? Where did you strike, if you remember what portion you struck, what part of Mr. Bromberg, and how hard?

The Court: With Mr. Joy there could you show just how it happened.

(Testimony of Genevieve Cline.)

Mr. Mautz: Mr. Joy won't mind. He is hard.

The Witness: No; it is perfectly all right.

Mr. Freed: He wants to know what you mean by brushing into [43] him.

The Witness: I can't tell which side it was.

The Court: Get away. She will have a little more room.

Mr. Freed: Your Honor understands she doesn't know which way she turned.

The Court: I understand. She told me that. What I want to know is about how hard you bumped into him. Show me that.

The Witness: I should say more or less like that (illustrating).

The Court: With your head turned away from him, you think? A. Probably.

Mr. Freed: Q. Now when did you tell Mr. Bromberg that you were sorry; at the time that you came in contact with him or afterwards when you started to pick him up?

A. Afterwards when I started to pick him up.

Q. And at this time do you remember just what words you used? A. No, I don't.

Q. And the statements that you have made here on the witness stand represent your own idea of what happened there? A. Yes.

Q. And you have never at any time intended to say anything different in any statement given to anybody?

Mr. Mautz: We will object, if the Court please.

(Testimony of Genevieve Cline.)

The statements that she gave earlier speak for themselves.

The Court: She may answer.

Mr. Freed: Do you understand my question?

[44]

The Witness: No, I don't.

Mr. Freed: Would you please read it.

(Last question read.)

A. No.

The Court: Were you in a hurry for any reason?

A. No, I wasn't.

Mr. Freed: That is all I have to ask you.

Re-Direct Examination

By Mr. Mautz:

Q. Genevieve, how do you know you were not in a hurry? In connection with your work as a Western Union messenger you occasionally are in a hurry, aren't you?

A. Well, occasionally, yes. But I remember that well. It was soon after I started there and Miss Brugman was telling me—she said that “Even if your telegram is marked ‘Rush’ never bother to run because you might meet up with an accident.”

Q. That was after this accident you were told that?

A. No. That was before. It was one rainy day she told me that.

Q. She told you not to run, but that doesn't mean you might not be in a hurry, does it?

(Testimony of Genevieve Cline.)

A. Well, no. But I mean usually people walking fast are on the verge of running.

Q. In your work for the Western Union delivering messages you never have even walked fast?

A. Yes, I have sometimes walked fast. [45]

Q. And you are sometimes in a hurry?

A. Yes, sometimes.

Q. And on this particular occasion you don't remember what the nature of your duties was; that is, what you were doing at the time? A. No.

Mr. Mautz: That is all.

The Court: How long had you been working for the company? A. At that time?

The Court: Yes.

A. Approximately——

The Court: That was June 1st.

A. Oh, about twenty-four days. It was not quite a month.

The Court: Had you ever done messenger work of any kind before? A. No, I hadn't.

The Court: What office were you coming from or were you going to?

A. I was at the office in the Pacific Building.

The Court: You had come up from there to the hotel? A. Yes.

The Court: Had walked up?

A. Yes.

The Court: Went through those swinging doors?

A. Yes. [46]

The Court: Up to the desk, and were going away? A. Yes.

(Testimony of Genevieve Cline.)

The Court: Do you remember anything about the day, what kind of a day it was?

A. Yes, I do. It was a nice day. I mean——

The Court: Nice summer day?

A. Spring day.

The Court: The first of June? A. Yes.

The Court: All right, gentlemen.

Mr. Mautz: That is all.

(Witness excused.)

Mr. Mautz: We will call Mr. Goss.

The Clerk: State your full name now.

Mr. Goss: John Goss.

JOHN GOSS

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Mautz:

Q. Your name is Jack Goss? A. Yes.

Q. Mr. Goss, were you on June 1st, 1942, working for the Congress Hotel as a bellhop? [47]

A. Yes, I believe so.

Q. And were you in the lobby of the hotel at the time this accident happened? A. Yes.

Q. What, if anything, did you hear Miss Cline say to Mr. Bromberg immediately after the accident?

(Testimony of John Goss.)

A. Well, she brushed against him and she said—

Q. I didn't ask you that, please. I asked you to testify what you heard her say immediately after the accident.

A. Well, "I'm sorry for knocking you down."

Q. I beg your pardon?

A. "I am sorry for knocking you down."

Mr. Mautz: You may inquire.

Cross Examination

By Mr. Freed:

Q. What did you say about brushing into him?

A. I was using her words.

Q. You didn't see the accident?

A. Not actually.

Q. You didn't see the happening?

A. No.

Q. You were not an eye witness to it, in other words? A. Not an eye witness.

Q. Was Mr. Bromberg on the floor when the messenger made the statement to him, or had he been helped up, or when was it, Mr. Goss? [48]

A. I beg your pardon?

Q. When did she make this statement to Mr. Bromberg.

A. Mr. Bromberg was on the floor on his back and I was helping him up, and she says, "I am sorry for knocking you down."

Q. Said it to him or to you?

A. To him.

Q. "I am sorry for knocking you down"?

A. Yes.

(Testimony of John Goss.)

Q. That was her words? Did she say anything else?

A. No. She went out.

Mr. Freed: No further questions.

Mr. Mautz: That is all. Thank you, Mr. Goss. You are free to go, now.

(Witness excused.) [49]

Mr. Mautz: If the Court please, I don't want any question about this and I will withdraw the original statement and confine my offer merely to the X-rays and to the original answer.

The Court: They will be admitted.

(The ten X-rays so offered and received, having been previously marked Plaintiff's Pre-Trial Exhibits 1 to 8, both inclusive, and Plaintiff's Pre-Trial Exhibits 11 and 12, were further marked "and trial," and the original answer of the defendant so offered and received, having been previously marked Plaintiff's Pre-Trial Exhibit 16, was further marked "and trial".)

PLAINTIFF'S PRE-TRIAL AND TRIAL
EXHIBIT No. 16

In the District Court of the United States for the
District of Oregon

Civ. 1389

I. BROMBERG,

Plaintiff

vs.

WESTERN UNION TELEGRAPH COMPANY,
a corporation,

Defendant.

ANSWER

Defendant answers the complaint as follows:

I.

Admits the allegations of paragraph I.

II

Answering paragraph II, admits that portion thereof down to and including the word "mail" in line 1 on page 2; and denies the remainder of said paragraph.

III

Denies the allegations of paragraph III.

IV

Answering paragraph IV states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph, and therefore denies the same.

V

Admits the allegations of paragraph V.

Wherefore defendant prays that plaintiff take nothing by his complaint and that defendant have judgment for its costs and disbursements.

SIMON, GEARIN, HUMPH-
REYS AND FREED
EDGAR FREED

Attorneys for Defendant
1111 Failing Building
Portland, Oregon

State of Oregon

County of Multnomah—ss

Due service of the within answer is hereby accepted in Multnomah County, Oregon this 13th day of October, 1942, by receiving a copy thereof, duly certified to as such by Edgar Freed of Attorneys for Defendant.

WILBUR, BECKETT, HOW-
ELL & OPPENHEIMER
Attorney for Plaintiff

United States of America

District of Oregon—ss:

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of Answer (Exhibit 16) in cause No. Civ. 1389, I. Bromberg vs. Western Union Telegraph Co. a corporation, has been by me compared with the original thereof, and

that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this August 30, 1943.

(Seal) LOWELL MUNDORFF

Clerk,

By F. I. Buck

Chief Deputy Clerk

[Endorsed]: Filed October 13, 1942.

Mr. Mautz: That is all. Plaintiff rests.

Mr. Freed: I don't know whether I can ask the Court, sitting as a tryer of the law as well as sitting as a jury, in other words, whether the procedure is to ask you to direct a verdict, but that is what I wish to present at this time. [51]

The Court: We understand—whatever the theory is it doesn't make any difference—the motion is to dismiss the action at this time?

Mr. Freed: At this time, and if a jury were here it would be a motion to direct a verdict. I don't think the rules of practice specifically define what is to be done, and I wish to state my grounds only; then if your Honor does not wish to hear more I will submit it.

The grounds are that there has been no negligence shown—no negligence of the messenger girl has been shown. It is shown that Mr. Bromberg was contributorily negligent under the situation, with his limited faculties and facilities, in placing himself where he

did, and that that proximately caused the accident.

Then another point that I wish to make, at least for the record, another ground is, that even if the girl were negligent and Mr. Bromberg was not contributorily negligent the rule of respondeat superior does not apply in this case, because the messenger girl was at a place where she had a right to be on her own account and not through permission of the Western Union. She was there as a citizen—it was a public place—in the exercise of one of her rights. She was not using any instrument or vehicle furnished by her employer. And I just wish to add to your Honor that I have at least two cases that uphold me there, and there are cases that dispute that, and I have to state my grounds.

And, thirdly, it is my understanding that you must have [52] some theory—or fourthly, or whatever it is—you must have some theory of the case, and the evidence here, so far as Mr. Bromberg testified, is that the girl turned around and came into him with her hands and shoved him over. The complaint and the pre-trial order, and apparently counsel's theory, seem to be that it was she bumped into him as an accidental thing entirely.

My last ground is that even if she were negligent, in other words, if she spun around, let us say, that neither she nor the Western Union—I mention that because it is not a question of their not being responsible on this point—the Western Union would not be liable unless she could have reasonably foreseen that injury would result from that act. A person is not responsible for everything that results, even directly, from their acts, even though their acts

might even be classed as negligent. There must be two things: They must be able to foresee that an injurious result would follow—I said I would not argue it unless your Honor asked me to, so I simply state those points.

The Court: I will reserve decision at this time. I will hear you fully again on all the case. [53]

DEFENDANT'S EVIDENCE

JAMES LENHART

was thereupon produced as a witness in behalf of the defendant and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Freed:

Q. Your name is James Lenhart?

A. That is right.

Q. You live here in Portland?

A. Yes, sir.

Q. What is your business now?

A. I am working in the ship yards.

Q. What shipyard? A. Albina.

Q. What was your occupation on June 1st, 1942?

A. I was head bell man and relief clerk at the Congress Hotel.

Q. That is in Portland here? A. Yes, sir.

Q. And when did you stop working for the Congress Hotel? A. August 26th, 1942.

Q. Did you go from there to the shipyards?

A. Yes, sir; at Vancouver.

(Testimony of James Lenhart.)

Q. And you left the employ of the hotel to go to the shipyards to work? A. Yes, sir. [54]

Q. How long have you lived in Portland?

A. I have been here since 1936.

Q. Now you say that you were head bell man at the Congress Hotel and relief clerk on June 1st 1942?

A. Yes, sir.

Q. Do you remember an incident on or about that date when Mr. Bromberg fell to the floor in the lobby of the Congress? A. Yes, sir, I do.

Q. Were you in the lobby at that time?

A. I was.

Q. Were you on duty?

A. I had just gone off duty.

Q. Well, what were you doing in the lobby?

A. It was payday and I was passing out the pay envelopes.

Q. I didn't hear the last.

A. It was payday and I was passing out the pay envelopes.

Q. Well, where were you standing when the accident took place? A. By the elevator.

Q. In the lobby of the hotel? A. Yes, sir.

Q. Did you see a Western Union messenger girl in the lobby at that time? A. I did.

Q. Where was she standing when you first saw her? A. In front of the desk. [55]

Q. At the main desk there in the lobby?

A. At the main desk in the lobby of the hotel.

Q. You knew Mr. Bromberg, the plaintiff in this case, didn't you? A. Yes, I did.

(Testimony of James Lenhart.)

Q. Was he a regular guest at the hotel then?

A. Yes, a permanent guest then.

Q. You saw Mr. Bromberg fall to the floor, did you? A. I did.

Q. Well, will you tell the Court what you saw at that time from the time you saw the Western Union messenger girl standing at the desk.

A. Well, I was standing by the elevator as Mr. Bromberg come out of the elevator and the girl was standing in front of the desk, and he shuffled from the elevator over and stood behind the girl I should say about three feet behind her and just a little bit to the right.

Q. Did he come out of the elevator?

A. Yes, he came out of the elevator kind of between, just a little bit to the right of her, kind of between her and the doorway, and he stood there, and she turned I am sure to her left and kind of made a circle around him.

Mr. Mautz: Just a minute. If the Court please, he says he is sure. I would like to find out before he tells his story if he saw this.

The Witness: Yes, sir. [56]

The Court: Is this a surprise to you?

Mr. Mautz: Well, what he is saying is a surprise.

The Court: Go ahead.

The Witness: She turned and went around behind him and at that time she was between Mr. Bromberg and myself. Now she might have brushed him but if she did it was very lightly, because she went on right by him and he fell and she stopped, and

(Testimony of James Lenhart.)

as he fell he said something, "Help", or "I am hurt", or something; just what his words were I don't know; and she stopped and rushed back to help him, and at the same time I rushed over to help him up, and if she said anything to him I didn't hear it. Then the minute we got there and started helping him up she went on out the door, and then we helped him up. First we put him on a settee in the lobby, and we seen he was pretty badly hurt, then we took him to his room.

Q. Then when she passed Mr. Bromberg, when she was leaving the desk, she would pass between him and you? A. That is right.

Q. Would that be it?

A. She passed between Mr. Romberg and myself. She kind of circled around behind Mr. Romberg in turning.

Q. You saw her pass Mr. Romberg?

A. I did.

Q. Were you aware that she came in contact with him? A. At the time, no. [57]

Q. You were in the court room this morning?

A. I was.

Q. You heard the testimony here this morning?

A. I did.

Q. And when did you learn that she did come in contact with him?

A. This morning. Well, that she actually bumped into him.

Q. From your vision, from your view there, you didn't see her actually strike him?

A. I did not.

(Testimony of James Lenhart.)

Q. And you were looking at them?

A. I was looking at them at the time.

Mr. Freed: You may take the witness.

Cross Examination

By Mr. Mautz:

Q. Mr. Lenhart, there where Mr. Bromberg was standing just before his fall were there any bags of carpet or turned-up linoleum, or anything else over which a person could have fallen? A. No, sir.

Q. Perfectly smooth floor, wasn't it?

A. It was, and dry.

Q. Yes. No obstruction or anything to trip at all?

A. No.

Q. Now as I understand your story, Mr. Bromberg came down, got out of the elevator, and walked over—I believe you used the word “shuffled”? [58]

A. That is right.

Q. And stood approximately three feet to the rear and a little to the side of this young lady?

A. That is right.

Q. You saw him do that? A. I did.

Q. You saw her at the desk? A. I did.

Q. You did. You said you saw the Western Union messenger. How did you know she was a Western Union messenger?

A. She had on a Western Union coat.

Q. She had on a Western Union coat. Did you know her otherwise? A. No.

Q. And then you watched and she turned around from the desk and walked around Mr. Bromberg in sort of a circular—

(Testimony of James Lenhart.)

Q. She kind of circled around behind him.

Q. —manner? A. Uh huh.

Q. And then some time after she was between you and Mr. Bromberg he fell to the floor?

A. That is right.

Q. How close was she to him at that moment?

A. When he fell?

Q. Yes.

A. She was quite a ways. I would says she was ten feet past him when he fell. She was ten feet. [59]

Q. She circled around him. She had passed him?

A. At least ten feet.

Q. And you saw this whole thing?

A. I did.

Q. From the start to the finish? A. I did.

Q. Your statement was taken after this accident happened, too, wasn't it? A. That is right.

Mr. Mautz: Would you hand the witness—will you have that marked first, please.

Mr. Freed: Is that one of the impeaching documents?

The Court: Has he seen that?

Mr. Freed: No.

The Court: Is this one that was sealed?

Mr. Mautz: No.

The Court: No, it was not sealed.

Mr. Freed: Well, can he use that, your Honor.

Mr. Mautz: I am certainly going to ask the Court's permission to use it.

Mr. Freed: I haven't seen it yet.

Mr. Mautz: You have got a copy of it, Mr. Freed.

(Testimony of James Lenhart.)

Mr. Freed: Well, I haven't seen that.

Mr. Mautz: Well, you will see it.

The Court: Mark it for identification. [60]

(The Statement of James H. Lenhart was thereupon marked Plaintiff's Exhibit 17 for identification.)

Mr. Mautz: Q. Mr. Lenhart, after this accident happened a representative of the Congress Hotel came to you and took your statement in this matter, did he not? A. Yes.

Q. And you told him what had happened and he wrote it down and you signed it?

A. That is right.

Mr. Mautz: Will you hand the witness——

Mr. Freed: Wait just a minute. Your Honor——

Mr. Mautz: Would you hand the witness, please, the exhibit. [61]

Mr. Mautz: Q. That appears to be a copy of the statement you signed, Mr. Lenhart?

The Witness: Wait until I get it read over. (Witness peruses paper.) That is the statement.

Mr. Mautz: We will offer in evidence Plaintiff's Exhibit 17 for identification. [65]

The Court: It is admitted.

(The statement of James H. Lenhart, so offered and received, having been previously marked Plaintiff's Exhibit 17 for identification, was marked received.)

The Court: I wish you would read it now.

Mr. Mautz: Yes. "Jim Lenhart, residing at 1615 North Simpton, Portland, Oregon, says:

(Testimony of James Lenhart.)

“On June 1st, 1942, at about 3:20 P. M., I was in the lobby of the Congress Hotel in Portland, where I am employed as head bellman. I was standing near the elevator and turned around just in time to see a Mr. Bromberg who lives at the hotel in the act of falling to the floor near the desk. There was a young Western Union messenger girl standing alongside of him and she was the first one to make any effort to help him. I then went over and with the help of Jack Goss, one of the bell boys, helped him to a settee in the lobby. The Western Union girl then went on her way and left the building. She said nothing to anyone but left right away. Later we took Mr. Bromberg to his room.

“The floor in the lobby where this accident occurred is covered with linoleum, was in good repair and was clean and dry. There was no object either bags, carpets or turned up linoleum over which anyone could have fallen.

“I have read the above and it is true.

“June 12th, 1942.

Signed “James H. Lenhart”. [66]

Q. Now that statement was taken from you about eleven days after the accident, wasn't it?

A. That is right.

Q. And at that time you told the person who contacted you, and you signed it after having said you had read it and “it is true”, that you were facing the elevator and you turned around in time to see Mr. Bromberg in the act of falling?

A. That is right.

(Testimony of James Lenhart.)

Q. And at that time the Western Union girl was standing alongside of him?

A. I also saw it before that time, too.

Q. You didn't say anything in here about it.

A. They didn't ask me to say anything about it.

Q. If you were facing the elevator, and if you turned around and saw him in the act of falling, as you say here—and that is true, isn't it?

A. I did see him fall, yes. That is what they wanted to know.

Q. All right; then how could you have been looking, as you told the Court here under oath, how could you have been looking and watching this entire episode from the time he went off the elevator and went down and stood three feet behind her and you saw her turn around, walk around him and get behind him and then saw him fall down when she was ten feet beyond him, and you say you saw all of that continuously—how do you reconcile this with your written statement that you turned around and you saw him in [67] the act of falling and her standing behind him? Tell the Court how you reconcile those statements.

A. I saw Mr. Bromberg walk across the floor and I turned around a moment. Definitely I must have turned around to the elevator and then turned back, because I saw her leave the desk and turn around him. In that statement they didn't ask me. All that they were interested in was what caused him to fall.

The Court: Who wrote this?

A. This representative of the Aetna Life Insurance Company.

(Testimony of James Lenhart.)

The Court: Where was he when he wrote it up?

A. In the lobby of the Congress Hotel.

The Court: Did he write it up with a pen?

A. I am pretty sure he did. I am not too positive whether he used a pencil or pen.

The Court: You didn't write it out?

A. No; I signed it.

The Court: Who else was there besides you and the Aetna man?

A. Just he and I.

The Court: None of your employers at the Congress?

A. You mean were present at the time?

The Court: Well, at the time he had the talk which resulted in that being written up.

A. No. Just he and I were there when we had the talk.

The Court: When you had the talk?

A. That is right, sir. [68]

The Court: Who introduced him to you?

A. Well——

The Court: Well, he was taking other statements at the time?

A. Yes. He was in the hotel at the time. I think it was the Clerk, but I am not too positive.

Mr. Mautz: Shall I continue, your Honor?

The Court: Yes.

Mr. Mautz: I have no other questions, except I would like to say the original statement is now in the city, if your Honor would like to see the form of it.

(Testimony of James Lenhart.)

The Court: No doubt that is the way it was done.

Mr. Mautz: This is an exact copy of it.

Mr. Freed: I make no objection because it is not the original.

Mr. Mautz: That is all.

Re-direct Examination

By Mr. Freed:

Q. Mr. Lenhart, the statement that you have made on the stand here as to how the accident happened is true, isn't it? A. Yes, sir.

Q. That is a true statement?

A. That is a true statement.

Q. And by anything that you said in this statement that you gave to the Aetna you did not mean to contradict the version that you have given on the stand, did you? A. I did not.

Mr. Freed: That is all. [69]

Re-cross Examination

By Mr. Mautz:

Q. You didn't even hear Miss Cline say she was sorry, either that she brushed into him, as she suggests, or that she knocked him down, as Mr. Goss says? A. If she said that I didn't hear her.

Mr. Mautz: Yes. That is all.

The Court: I just want to ask a few questions more.

The Witness: Yes.

The Court: You have been around the Congress a good while, haven't you?

A. Well, I was there just a little over a year at the Congress.

(Testimony of James Lenhart.)

The Court: And what is your age?

A. I am twenty-seven.

The Court: Are you married?

A. Yes, sir.

The Court: Got children?

A. Yes, sir.

The Court: Where do you live in Portland?

A. 1615 North Simpson.

The Court: How long did you work for the hotel?

A. I have been working in hotels since May 1st, 1937.

The Court: Around Portland?

A. Well, all but six months out of that time I worked for a hotel in Klamath Falls. [70]

The Court: '37?

A. I worked at the Roosevelt Hotel from May 1st, 1937, until in May, 1940, and I was in the insurance business ten months, then in a hotel at Klamath Falls for six months, then I went to the Congress and was there until I went in the shipyards.

The Court: That is all.

Mr. Mautz: I don't know now, your Honor—I am taken by surprise, frankly, on this, and I want to ask a foundation question. Possibly I can't bear it out any more than this statement does, but I would like to ask it. I will see what I can do during the noon hour.

Q. Mr. Lenhart, at the time that this statement was taken by an insurance representative in the Congress Hotel on June 12th, I think it is, 1942, isn't it a fact that you told him that you were facing the

(Testimony of James Lenhart.)

elevator and you turned and saw Mr. Bromberg in the act of falling and the Western Union girl standing alongside of him, and that is all you had seen about the accident and all you knew about it?

A. I didn't say anything in there that isn't true. That is all true.

The Court: He is asking you—I think you ought to have this in mind: He is going to talk with the investigator during the noon hour.

The Witness: Uh huh.

The Court: To see if you told the investigator that this is [71] all you knew about the accident and all that you saw.

The Witness: Uh huh.

The Court: That is the question he is asking you now, whether you told the investigator that.

A. Uh huh.

The Court: That statement doesn't say that, but he is asking you whether you told him, the investigator, that?

The Witness: I wouldn't swear to it.

Mr. Mautz: Q. You wouldn't swear to it?

A. I wouldn't; no.

Q. In other words, on June 12, 1942, when he was taking your statement as to what happened you may have told the investigator that what was stated in that statement was all that you know; is that so?

A. If he asked me I might have.

Mr. Mautz: You might have. I see. Well, that is all.

The Court: Is the investigator here, Mr. Mautz?

(Testimony of James Lenhart.)

Mr. Mautz: That I am going to try to find out.

The Court: Is he in the court room now?

Mr. Mautz: No. I am going to try to find out as soon as we adjourn.

Re-direct Examination

By Mr. Freed:

Q. The testimony you have given on the stand as to what you saw was true? That is so, is it? [72]

A. That is right.

The Court: Of course, if you told me the investigator what is in that statement is all that you know about it, you realize that is inconsistent with what you have said here this morning?

A. I realize it if I said that. The time that was made out the thing that was important, the thing we were after was that he didn't slip on a slippery floor, or something like that.

The Court: You were trying to protect the hotel?

A. Not necessarily.

The Court: I mean, that is what the inquiry was about?

A. That is what it was about; yes, sir.

Re-cross Examination

By Mr. Mautz:

Q. And there was nothing about the floor, or the slipperiness of the floor, or obstacles, or anything else that required him to fall, or caused him to fall?

A. Nothing—wait a minute. Let me get that straight. You mean there was nothing on the floor that caused him to fall?

(Testimony of James Lenhart.)

Q. Yes. A. Nothing at all.

The Court: The Navy has asked me to have a brief hearing here at 1:30. Probably it will be quarter to two before we can start.

Mr. Mautz: I wonder if the Court would excuse Mr. Bromberg this afternoon?

The Court: Oh, yes. Or we can go on now, if you want to. [73]

Mr. Freed: I didn't look at the clock. That is all.

The Court: There has been too much excitement. Step down.

(Witness excused.)

(At this point, 12:05 o'clock P. M., a recess was taken herein and at 2:45 o'clock P. M., proceedings were resumed herein as follows:)

Mr. Freed: I think I was in the defendant's case. I have forgotten, we were talking, but I guess you had closed your cross-examination.

Mr. Mautz: Yes.

Mr. Freed: I want to offer in evidence the plaintiff's deposition, and that was Pre-Trial Exhibit No. 14.

Mr. Mautz: No objection.

The Court: It is admitted.

(The deposition of I. Bromberg, the plaintiff, so offered and received, having been previously marked Defendant's Pre-Trial Exhibit 14, was further marked "and trial".)

DEFENDANT'S PRE-TRIAL AND TRIAL
EXHIBIT NO. 14

In the District Court of the United States
for the District of Oregon

Civil No. 1389

I. BROMBERG,

Plaintiff,

vs.

WESTERN UNION TELEGRAPH COMPANY,
a corporation,

Defendant.

Portland, Oregon, December 7, 1942.

10:20 O'clock A.M.

Be It Remembered That, pursuant to the stipulation hereinafter set out, the deposition of I. Bromberg, the plaintiff above named, was taken before Edwin L. Holmes, a Notary Public for Oregon, on Monday, December 7, 1942, at the library of the United States Court House, in the City of Portland, County of Multnomah, State of Oregon.

Appearances:

For the Plaintiff:

Mr. Robert T. Mautz.

For the Defendant:

Mr. Edgar Freed.

Defendant's Pre-Trial and Trial
Exhibit No. 14—(Continued)

(It was stipulated and agreed by and between the attorneys for the respective parties that the deposition [1*] of the above named plaintiff may be taken by the defendant as an adverse party at the library of the United States Court House, in the City of Portland, County of Multnomah, State of Oregon, on Monday, December 7, 1942, at the hour of 10:20 o'clock A.M., before Edwin L. Holmes, a Notary Public for Oregon.

It was further stipulated that the deposition, when written up, may be read in evidence by either party on the trial of the clause.

It was further stipulated that all objections as to the notice of the time and place of taking the deposition are waived, that all objections as to the form of the questions are waived unless objected to at the time the questions are asked, and that all other objections, including objections as to materiality, relevancy, and competency of the testimony, are reserved to all parties until the time of trial.

It was further stipulated that the reading over of the testimony to or by the witness and the signing thereof are expressly waived.)

I. BROMBERG,

the plaintiff herein, being first duly sworn by the Notary to tell the truth, the whole truth, [2] and nothing but the truth, was thereupon examined and testified as follows:

*—Page numbering appearing at top of page of deposition.

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

Examination by Mr. Freed:

Mr. Mautz: I have no objection to your being sure that Mr. Bromberg hears the question.

Mr. Freed: Oh, sure.

Q. Mr. Bromberg, if I don't talk loud enough——

A. (Interrupting) I am a little hard of hearing.

Q. If I don't talk loud enough or if you don't understand what I say then please ask me.

A. All right.

Q. You are the plaintiff in an action entitled I. Bromberg against the Western Union Telegraph Company which is pending in the Federal Court here?

A. Yes.

Q. How old are you, Mr. Bromberg?

A. Eighty-seven.

Q. Do you know how much, approximately, you weigh?

A. No.

Q. You don't know that?

A. I haven't weighed myself, because I was always sick. I didn't weigh myself for a long time.

Q. Then you would not know about what you weighed on March 1st of this year?

A. No, I don't. [3]

Q. Can you tell me what the condition of your health was prior to this accident at the Congress Hotel on March 1st of this year—your general health?

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

Mr. Mautz: Before the fall.

Mr. Freed: Before you fell.

A. Before I fell?

Q. Yes. A. Pretty fair; good.

Q. Had you been attended by a doctor before that?
A. Yes, I had a doctor.

Q. You were under the attention of a doctor at that time, that, is before you fell?

A. Before the fall?

Q. Yes, sir. A. No.

Q. You were living at the Congress Hotel, weren't you?
A. Yes, sir.

Q. How long had you lived there, Mr. Bromberg?

A. At the Congress Hotel? I lived quite a few years there.

Q. Did you live alone there or did someone stay with you?
A. Yes.

Q. Alone?

A. Yes, alone. I occupied my own room.

Q. Now you said that you had not weighed yourself in a long time because you had been ill. [4]

A. Yes.

Q. Now what kind of illness was that?

A. What?

Q. What kind of illness? What was the matter with you? You said you had been ill. What was the matter with you?

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

A. That wasn't why I didn't weigh myself. I didn't care to be weighed, not on account of illness.

Q. No, but you spoke of being ill, and I am asking you what that illness was.

A. You want to know the time?

Q. Yes. A. In connection with what?

Q. Before this fall, before the time that you fell in the Congress Hotel, when was the last time before that that you were ill?

A. I can't tell what time.

Q. You were not ill at that time, however, were you? A. Not at that time, no.

Q. Had you ever had any falls before this one on March 1st in the Congress Hotel?

A. Oh, certainly, I am a living man and sometimes I fall.

Mr. Mautz: Edgar, excuse me. You keep referring to March 1st. Isn't it June 1st that we are concerned with?

Mr. Freed: Excuse me.

Q. When I have been referring to March 1st, 1942, I find that I was in error. The fall was on June 1st, 1942, and I meant to [5] refer to June 1st. When was the last time prior to June 1st 1942—that is the day when you had this fall in the Congress Hotel—that you had had a fall?

A. I can't remember the time when I fell.

Q. Was it a long time before June 1st of this year? A. A long time what?

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

Q. Was the last fall that you had before the fall that is the subject of this action here a long time before June 1st of this year? You say you don't remember exactly when it was. Was it a long time before June 1st of this year?

A. Do you mean that I had another fall before this?

Q. Yes. A. I don't remember.

Q. Then you don't remember of having any other falls except this one?

A. No. I might have had a fall, but I never paid much attention to it.

Q. Have you ever had any fainting spells?

A. Any what?

Q. Any fainting spells?

A. No. Through my life it may happen, but——

Q. (Interrupting) I mean in the last few years.

A. No.

Q. Mr. Bromberg, will you tell me how that accident happened, that fall happened, in the Congress Hotel on June 1st of this [6] year?

A. You mean the way I fell?

Q. How it happened, yes.

A. To what time do you refer?

Q. To the time that you fell in the Congress Hotel on June 1st of this year, the fall that is the subject of this action here, this lawsuit. I am asking you to tell me how it happened.

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

A. I can't remember exactly how it happened. Do you refer to the last fall?

Q. Yes, sir, the one that is the subject of this lawsuit.

A. Let me see. I can't remember the date of it.

Q. Well, it was on June 1st, I believe, of this year.

A. On June 1st, yes.

(A short discussion was then had by the attorneys, off the record.)

Q. (By Mr. Freed) Mr. Bromberg, you say you don't remember how it happened, and I am going to ask your attorney to ask you a question or so to see if he can make it clear to you as to what I am seeking.

A. When?

Mr. Mautz: Mr. Bromberg, you remember when you had your fall in the Congress Hotel there while you were waiting for your mail?

A. When I had my fall, yes. [7]

Mr. Mautz: At the Congress Hotel.

A. Yes, but I can't remember the date.

Mr. Mautz: Forget the date; we know what the date is. Just tell us what happened, what you were doing, and where you were standing, and just tell us how it happened, please. Never mind the date; just tell us what happened there at that time.

A. When I fell at the Congress Hotel?

Mr. Mautz: Yes.

A. I don't know exactly how I fell.

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

Mr. Mautz: Do you remember Saturday morning I came up to you and talked to you in your room up at the rest home? A. No.

Mr. Mautz: You don't remember my talking to you Saturday morning up there in your room up at the convalescent home?

A. Maybe you do. I don't remember much about talking to you.

Mr. Mautz: And you told me how the accident happened when I was there Saturday morning. Now do you remember about your fall at the Congress? You remember about it, don't you?

A. Because of the young girl. She gave me a push and threw me to the floor.

Mr. Mautz: And what were you doing at the time?

Mr. Freed: I would like to proceed.

Mr. Mautz: Yes, you can ask any questions. What were you doing at the time just before the fall? [8]

A. What I was doing?

Mr. Mautz: Yes.

A. I wasn't doing anything. How do you mean?

Mr. Mautz: Well, were you sitting down or standing up? Were you in the restaurant, or in the lobby, or where were you?

A. I was standing by the counter.

Mr. Mautz: What for?

A. Well, I was waiting for my mail.

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

Mr. Freed: Mr. Mautz, I would like to proceed.

Mr. Mautz: All right, sure.

Mr. Freed: Thank you very much for reminding him.

Q. (By Mr. Freed) Now what were you doing when you fell, Mr. Bromberg?

A. When I fell?

Q. Yes, sir.

A. Well, when I fell I felt hurt. I cried with pain, and then they had to take me to my room and put me to bed.

Q. You fell down on the floor? A. Yes.

Q. And somebody picked you up?

A. Yes, somebody picked me up.

Q. And carried you up to your room?

A. Yes.

Q. Now what did you say caused you to fall? Why did you fall down? What made you fall down? [9]

A. Because the little—a young lady, a girl—a young lady; I don't remember exactly who it was.

Q. Well, that is what I would like to know. I would like to have you tell me what this young lady did to cause you to fall. I believe you said in your complaint and you said in answer to Mr. Mautz's question that you were standing near the desk at the Congress Hotel waiting for your mail.

A. Yes.

Q. Now what happened then?

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

A. While I was waiting for the mail I found a young girl there occupied with the clerk in conversation. I waited until she was through with her conversation and then I will try to talk to him. What was your question?

Q. That is right. Then what happened next? You were waiting there, and what happened after that? You said you were waiting behind this young girl and you were waiting to go up and talk to the clerk?

A. Yes.

Q. Then what happened? What happened next?

A. I was waiting until this girl would be through and then I will talk to the clerk.

Q. Then what happened?

A. I can't remember exactly about what happened.

Q. Later on you fell to the floor. Now what happened while you waiting there behind this girl? What happened next [10] now?

A. I was waiting behind this girl, and when she was through——

Q. (Interrupting) What did she do?

A. She pushed me; she gave me a strong push in my chest and threw me to the floor. She had room to walk around, and she pushed me right on my chest and threw me to the floor.

Q. Then she pushed you on your chest?

A. Yes.

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

Q. What part of her body pushed you on your chest? A. What?

Q. What part of her body touched you? With her hands?

A. Yes, with her hands, right on the chest.

Q. Did her hands——

A. (Interrupting) Yes, right on my chest, and I fell on the back.

Q. The girl's hands pushed you? Her hands were on your chest and she pushed you down? Is that it? A. What?

Q. You said the girl pushed you down?

A. Yes.

Q. And you said she pushed you on your chest?

A. On my chest.

Q. What part of her body struck your chest, her hands? What part of the girl's body struck your chest? A. I don't know. I knew—— [11]

Q. You knew what?

A. I knew the action of her hands.

Q. Her hands pushed you? A. Yes.

Q. You understand what I am asking you?

A. No.

Q. Well, you said the girl pushed you down. That is right, isn't it? A. Yes.

Q. And you said she pushed you on your chest?

A. Yes.

Q. Now did she push you with her hands? Did the girl push you with her hands?

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

A. With her hands, sure.

Q. Well, that is what I am asking you. You were standing back of her waiting at the counter there, at the desk? A. What?

Q. You were waiting at the desk in the hotel?

A. I was waiting at the desk until she would be through.

Q. And her back was turned toward you, wasn't it? A. What?

Q. The girl's back was toward you? You were behind the girl? You were standing behind her?

A. I was standing on the side of the girl waiting until she would be through. [12]

Q. Well, were you standing behind her, toward her back, or at her side? A. Behind her.

Q. And did she turn around and shove you?

A. What?

Q. Did she turn around and face you and shove you down? A. Yes.

Q. Was she running or walking?

A. I don't know why she have to do that because she had plenty of room around me, and yet she went and pushed me right on my chest and threw me down.

Q. Well, was she walking or running or standing still when she shoved you down?

A. She was right near me on the place there.

Q. She was standing still when she shoved you down? A. Yes, she was standing.

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

Q. She was not running?

A. She was not running.

Q. Was she walking?

A. Yes, she was walking.

Q. She was not standing still then?

A. I don't remember that, but I remember what happened.

Q. She was walking? When she shoved you down, as you say, she was walking?

A. When she shoved me down? [13]

Q. Yes, sir. A. I guess she was walking.

Q. I thought you were standing right behind her. I thought you were standing right behind the girl. You said you were standing right behind her?

A. Yes.

Q. Now would she have to walk to reach you, to get to where she could shove you?

A. I don't know what way she moved; I cannot describe it.

(A recess was then taken, after which the taking of the deposition was continued as follows:)

Q. (By Mr. Freed) You said that you were standing waiting to talk to the clerk at the desk, to get your mail or for some other purpose?

A. Yes, and I found another girl occupied the conversation. I waited until she would be through and then I would talk to him.

Q. And then she, you said, shoved you down?

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

You said she shoved you and caused you to fall down? A. Yes.

Q. Now how did that happen? Did she turn around and shove you, or what did she do? Just what did she do?

A. I cannot tell the action but I knew the deed, what was done.

Q. You don't remember just how it happened, though? [14]

A. Well, I remember most of it.

Q. Well, will you tell me what you remember?

A. I have told you that.

Q. Yes, you told me that you were standing behind her there at the counter waiting. You said you were standing behind the girl at the counter. Now what happened next?

A. I was behind her or at the side of her. I was waiting until she would be through and then I will come forward.

Q. And then what happened? What did she do then?

A. I don't remember what she has done.

Q. You said that she shoved you down?

Mr. Mautz: "Pushed" was his word.

Q. (By Mr. Freed) Pushed you down?

A. Yes.

Q. You were standing there either beside her or back of her, and you said she pushed you down.

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

Did she turn around and push you down with her hands, or what did she do?

A. Yes, she pushed me down with her hands, sure.

Q. Do you remember whether you were standing by her side or back of her? You said once you were standing back of her, and just now you indicated that perhaps you were standing beside her and I wondered which it was.

A. The girl was occupied with the clerk and I was waiting until she will finish her conversation and then I will occupy the clerk. [15]

Q. Were you waiting behind the girl or to the side of the girl?

A. Yes, I was waiting behind her.

Q. Behind the girl? A. Yes.

Q. And then what did the girl do?

A. The girl—while I was standing there and waiting until she was through, instead of having plenty of room to leave she went—it wasn't good enough and she went and pushed me right on the floor.

Q. Then she turned around and pushed you? Is that right?

A. I met her with the front, on the push.

Q. Just one more question on that. How far away from this girl were you standing when you were waiting for her to get through so you could

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

talk to the clerk? How far away from the girl were you?

A. Do you mean how far away from me?

Q. How far away from you was the girl when you were standing there waiting to talk to the clerk?

A. Right by the side of her.

Q. Would you say you were almost touching her? Were you that close?

A. I don't remember anything about close; right by her side.

Q. Not very far away? A. No.

Q. Would you say that you were as much as a foot away, twelve [16] inches away?

A. Between?

Q. Yes.

A. I didn't know the measure, but I know I was close to her. It wasn't far.

Q. You were quite close to her? A. Close

Q. And you were taken up to your room, you said, after you fell to the floor? A. Yes.

Q. Where were you taken from there, do you remember? To a hospital? A. To the hospital.

Q. And you were under a doctor's care?

A. Yes, I was under a doctor's care. The girl had plenty of room to walk around. She had no business coming to me and pushing me.

Q. Did you see the girl after you had fallen to the floor? Did you see her any more?

A. I don't think so.

(Deposition of I. Bromberg.)

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

Q. And you don't remember who picked you up?

A. No. That was what made me all the trouble.

Mr. Freed: I think that is all.

(Witness excused.) [17]

State of Oregon,

County of Multnomah.—ss.

I, the undersigned, Edwin L. Holmes, a Notary Public for Oregon, do hereby certify that on the 7th day of December, 1942, at the hour of 10:20 o'clock A.M. of said date, before me, as such Notary, at the library of the United States Court House, in the City of Portland, County of Multnomah, and State of Oregon, personally appeared pursuant to the stipulation herein set out the above named plaintiff, I. Bromberg; Mr. Robert T. Mautz appearing as attorney for the plaintiff and Mr. Edgar Freed appearing as attorney for the defendant, and the deposition of the said I. Bromberg was thereupon taken on oral interrogatories, the said witness having been first duly sworn by me to testify the truth, the whole truth, and nothing but the truth.

I further certify that all interrogatories propounded to said witness, together with the answers of said witness thereto and other proceedings occurring upon the taking of said deposition, were then and there taken down by me in shorthand and thereafter

Defendant's Pre-Trial and Trial

Exhibit No. 14—(Continued)

by me reduced to typewriting, that the foregoing 17 pages, numbered from 1 to 17, inclusive, are a full, true, and accurate transcript of my said shorthand notes, and that the witness testified as therein set forth.

Witness my hand and notarial seal at Portland, Oregon, this 9th day of December, 1942.

[Seal]

EDWIN L. HOLMES,

Notary Public for Oregon.

My Commission expires July 25, 1944.

[Endorsed]: Filed Dec. 10, 1942. [18]

Mr. Freed: I want to offer in evidence the plaintiff's complaint, which was Defendant's Pre-Trial Exhibit 15.

Mr. Mautz: No objection.

The Court: Admitted. [74]

(The complaint in this case so offered and received, having been previously marked Defendant's Pretrial Exhibit 15, was further marked "and trial".)

DEFENDANT'S PRE-TRIAL AND TRIAL
EXHIBIT NO. 15

In the District Court of the United States
for the District of Oregon

Civil No. 1389

I. BROMBERG,

Plaintiff

vs.

WESTERN UNION TELEGRAPH COMPANY,
a corporation,

Defendant

COMPLAINT

The plaintiff complains of the defendant and for
cause of action alleges:

I

That at all times herein mentioned the defendant was and is a foreign corporation, duly authorized to transact business in the State of Oregon and is transacting business in said state as a telegraph company and with its principal office and place of business in the City of Portland, Oregon; that in connection with its business in the State of Oregon the defendant employed numerous persons to pick up and deliver messages and packages; that at all times herein mentioned, one Genevive Cline was employed by the defendant as a messenger and among other things, picked up and delivered messages for the defendant at hotels and business houses in the downtown district of Port-

land, Oregon and that at the time of the accident hereinafter referred to the said Genevive Cline was acting in the course of her employment for the defendant and in the furtherance of its business.

II

That on the 1st day of June, 1942 and prior thereto the plaintiff resided at the Congress Hotel in Portland, Oregon and on said date was standing behind the said Genevive Cline near the main desk of said hotel in the lobby thereof awaiting his turn to ask for his mail. That said Genevive Cline, then and there acting for and on behalf of the defendant, carelessly, recklessly and negligently made a sudden and abrupt turn from said desk and walked directly into and against the plaintiff, knocking him to the floor of said hotel lobby and causing the injuries hereinafter described.

III

As a direct and proximate result of the carelessness, recklessness and negligence of the defendant through its said employee as aforesaid the plaintiff sustained a fracture of the neck of the right femur with external rotation of the distal fragment and some coxavara and was caused to suffer physical pain and mental anguish and to become lame and disabled and was required to be hospitalized and to be attended by physicians and to be operated upon, and the plaintiff has been disabled and under medical treatment and hospitalized ever since and will be for an indefinite

time in the future all to his general damage in the sum of \$7500.00.

IV

That by virtue of said injuries the plaintiff has been caused to incur expenses for hospital, nursing, physicians, X-rays, rest home, ambulance and wheel-chair in the sum of \$1,413.70 to date which the plaintiff claims as special damages.

V

That this controversy is between citizens of different states and the amount involved exceeds the sum of \$3000.00, exclusive of interest and costs.

Wherefore, plaintiff prays judgment against the defendant for the sum of \$7500.00, general damages and the further sum of \$1,413.70, special damages and for his costs and disbursements herein incurred.

WILBUR, BECKETT,
HOWELL & OPPEN-
HEIMER

By Robert T. Mautz

Attorneys for Plaintiff
1001 Board of Trade
Building
Portland, Oregon

United States of America

District of Oregon—ss:

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of Com-

plaint (exhibit 15) in cause No. Civil 1389, I, Bromberg vs. Western Union Telegraph Company, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this August 30, 1943

[Seal] LOWELL MUNDORFF

Clerk,

By F. L. BUCK

Chief Deputy Clerk

[Endorsed]: Filed September 16, 1942.

The Court: What is in the complaint that you have in mind?

Mr. Freed: Well, I have in mind that the complaint says—may I read that little part here, your Honor? The complaint says that the messenger carelessly and recklessly—

The Court: Pushed him?

Mr. Freed: No, he didn't say pushed him. That is just what I want.

The Court: All right. I get your point. Why did you amend your answer? Tell me that.

Mr. Freed: To set up contributory negligence. I had not ever talked to Mr. Bromberg—

The Court: I remember now.

Mr. Freed: —and after taking his deposition—

The Court: I remember now.

Mr. Freed: That was it. I believe that we are ready to close our case. The defendant rests.

REBUTTAL

Mr. Mautz: Call Mr. Mercer.

GEORGE A. MERCER

was thereupon produced as a witness in rebuttal, in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

Direct Examination [75]

By Mr. Mautz:

Q. Your name is George A. Mercer?

A. Yes, sir.

Q. What is your occupation?

A. Manager of the Claim Department of the Aetna Life Insurance Company.

Q. In Oregon? A. Oregon.

Q. How long have you occupied that position?

A. Twenty-six or twenty-seven years.

Q. Did one of your affiliated companies have an interest because of insurance in the Congress Hotel in June of '42? A. Yes.

Q. Mr. Mercer, do you have a number of investigators or adjusters working under you?

A. Yes; ten or a dozen.

(Testimony of George A. Mercer.)

Q. Are they generally instructed as to what they are to secure in the way of information when they investigate an accident? A. Usually.

Q. Yes. State whether or not they are instructed to get all of the information that is known to witnesses whom they interrogate?

A. Yes, they are instructed to. I want to qualify that a little by saying six of my boys are attorneys and are supposed to know what they are after, and this man in particular that took this was an attorney, had years of experience back of him, and I told [76] him to go on up and cover it.

Q. And in covering it you mean get all the information that every given person has?

A. Everything that is incidental to the alleged accident.

Q. And who was the man in your department who investigated the accident in which Mr. Bromberg suffered injury in the Congress Hotel on June 1st, 1942? A. William Bembridge.

Q. Is he with you at this time? A. No.

Mr. Mautz: That is all.

Mr. Freed: No questions.

(Witness excused.)

C. V. COWDEROY

was thereupon produced as a witness in rebuttal, in behalf of the plaintiff, and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Mautz:

Q. Mr. Cowderoy, your name is E. V. Cowderoy?
A. That is right.

Q. What is your business?

A. Claims Manager.

Q. For whom?
A. United Pacific. [77]

Q. And is William Bembridge one of your employees?
A. Yes, sir.

Q. Working out of your department?

A. Yes, sir.

Q. I will ask you to state whether you received a phone call from an attorney involved in this case today as to Mr. Bembridge's whereabouts?

A. Yes, sir.

Q. And about what time was that?

A. Just shortly before noon, I would say.

Q. And who was that attorney?

A. Mr. Mautz.

Q. Myself?
A. Yes, sir, that is right.

Q. And what did you ascertain at that time in trying to find out where Mr. Bembridge was?

A. I checked with the telephone girl and was informed he would not be back until tomorrow morning.

Q. That he would not be back?
A. Yes.

Q. And was it possible to find out in your office where he could be located now?
A. No, sir.

(Testimony of C. V. Cowderoy.)

Q. Or where he is now?

A. No; just out in the territory. [78]

Q. And he will not be available during the business or court day until tomorrow morning?

A. That is right.

Mr. Mautz: That is all.

The Witness: I could see that you had him by nine o'clock or ten o'clock tomorrow.

Mr. Mautz: Pardon me?

The Witness: I could have him in the morning.

Mr. Freed: Nine o'clock? A. Yes.

Mr. Mautz: Q. In other words, he might be reached at home to night? A. Yes.

Mr. Mautz: That is all.

Mr. Freed: That is all.

(Witness excused.)

Mr. Mautz: If the Court please, that was the best I was able to do in trying to get the particular individual that conducted this investigation. In view of the witness Lenhart's own testimony that he may have made the statement to this man, which I laid as impeachment, I think that probably would be sufficient anyhow, but, as I say, if your Honor would want anything in addition from Mr. Bembridge's own lips I found as soon as I left the court room—and I called from the Library—I would not be able to get it [79] before tomorrow morning; so if your Honor felt that was an important part of the case, just what transpired between Lenhart and that particular investigator, I would like the privilege of calling him in the

morning and having him tell his story. If your Honor does not think that is important to your Honor's decision on the outcome of course there would be no need to take that additional time.

The Court: Everybody will feel better if you call him, but I would like you to argue the case as much as you can now.

Mr. Mautz: Well, with the exception of Mr. Bembridge the plaintiff rests.

Mr. Freed: Whatever the Court wishes to do about it, and counsel, will be completely satisfactory to me, but I was in hopes that we could complete this case today. But when we checked through the evidence we didn't—I didn't and I don't think Mr. Mautz did—have any idea that the case would run over today, and I am willing to stipulate if he were here that he would say he asked him that. I don't want to deprive counsel of any evidence he may have. Obviously I will have to be here. Whatever the Court says.

Mr. Mautz: If Mr. Freed is willing to stipulate to let the record show that Mr. Bembridge, when present, would testify that he took this statement from Lenhart and he asked Lenhart to tell him everything that he knew about this accident, and Lenhart told him what was in that statement which was written down, and that when that was completed Lenhart stated that was all he knew about [80] it, why, if the record can so show I would not have any purpose in calling Bembridge.

Mr. Freed: I don't know whether he would say

it or not, but I am willing to let the record show that, if we don't have to go over until tomorrow.

The Court: You so stipulate?

Mr. Freed: I so stipulate; yes.

(Reporter's Certificate attached.)

[Endorsed]: Filed June 22, 1943. [81]

[Endorsed]: No. 10542. United States Circuit Court of Appeals for the Ninth Circuit. Western Union Telegraph Company, a corporation, Appellant, vs. I. Bromberg, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed September 7, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10542

I. BROMBERG,

Appellee,

vs.

WESTERN UNION TELEGRAPH COMPANY,

Appellant

STATEMENT OF THE POINTS ON WHICH
THE APPELLANT INTENDS TO RELY

Pursuant to Rule 19(6) of the Rules of this Court, the appellant presents the following statement of the points on which it intends to rely on this appeal:

(1) The trial court erred in finding that Genevieve Cline, the defendant's messenger girl, was negligent, and that negligence on her part proximately caused the injuries to plaintiff. (See Findings of Fact II, III and V; Certified Record, page 14.)

(2) The trial court erred in finding that said Genevieve Cline made an abrupt turn and walked directly into and against the plaintiff. (See Findings of Fact II and III; Certified Record, page 14.)

(3) The trial court erred in finding that the plaintiff was not guilty of any negligence (see Findings of Fact IV, Certified Record, page 14), and in not finding that the plaintiff was guilty of contributory negligence.

(4) The trial court erred in concluding that the plaintiff was entitled to recover from the defendant any sum whatever, and in giving judgment against the defendant for any sum whatever. (See Conclusions of Law, I, and Judgment; Certified Record, page 15.)

(5) The trial court erred in not granting the plaintiff's motion to dismiss. (See Transcript of Testimony, pages 51 to 53.)

(6) The trial court erred in finding that said Genevieve Cline, in coming in contact with the plaintiff, was acting for the defendant. (See Findings of Fact I, III and V; Certified Record, pages 13 and 14.)

(7) The trial court erred in finding that the plaintiff was specially damaged in a sum of more than \$1,413.70, and in concluding that the plaintiff was entitled to recover from the defendant special damages in excess of said sum, and in giving judgment against the defendant for special damages in excess of said sum, (see Findings of Fact, VII, Conclusions of Law, I, and Judgment; Certified Record, page 15), in view of the allegations of paragraph IV of the Complaint (see Certified Record, page 3) and in view of the contentions of the plaintiff as defined in the Pre-Trial Order (see Certified Record, page 9.)

SIMON, GEARIN, HUM-
PHREYS & FREED
EDGAR FREED

Attorneys for Appellant

State of Oregon

County of Multnomah—ss.

Service of the within Statement of the Points on Which the Appellant Intends to Rely is hereby accepted in Portland, Multnomah County, Oregon, this 4th day of September, 1943, by receiving a copy thereof, certified to as such by Edgar Freed, Attorney for Appellant.

ROBERT T. MAUTZ,

By F. B. KEITH

Attorney for Appellee

[Endorsed]: Filed Sept 7, 1943. Paul P. O'Brien, Clerk.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

WESTERN UNION TELEGRAPH COM-
PANY, a corporation,

Appellant,

vs.

I. BROMBERG,

Appellee.

APPELLANT'S BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

HON. CLAUDE MCCOLLOCH, *District Judge.*

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Attorneys for Appellee.

FILED

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PAUL P. O'BRIEN
CLERK

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

WESTERN UNION TELEGRAPH COM-
PANY, a corporation,

Appellant,

vs.

I. BROMBERG,

Appellee.

APPELLANT'S BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

HON. CLAUDE MCCOLLOCH, *District Judge.*

JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the District Court in this case is based upon 28 U.S.C.A., Section 41(1), this being a suit between citizens of different states in which the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00. The plain-

tiff is a citizen of Oregon (Paragraph II of the Complaint, page 3 of the Transcript of Record); and the defendant is a foreign corporation (Paragraph I of the Complaint, Tr. 2). The matter in controversy is whether or not the defendant is legally responsible for the personal injuries sustained by plaintiff as the result of falling to the floor of the lobby of the Congress Hotel in Portland, Oregon, on June 1, 1942, following a bodily contact with Genevieve Cline, a messenger girl employed by defendant, for which injuries the plaintiff claimed \$7,500.00 general damages and \$1,413.70 special damages (Paragraphs I to V, inclusive, of the Complaint, Tr. 2 to 5).

JURISDICTION OF THE CIRCUIT COURT OF APPEALS

The jurisdiction of the Circuit Court of Appeals to review the judgment of the District Court (Tr. 16-17) is based upon 28 U.S.C.A., Sec. 225, it being a final decision in the District Court, a direct review of which may not be had in the Supreme Court under 28 U.S.C.A., Sec. 345.

CONCISE STATEMENT OF THE CASE

This is an action to recover damages for personal injuries sustained by the plaintiff-appellee, I Bromberg, hereinafter called "Mr. Bromberg," through the alleged negligence of the defendant-appellant, Western Union Telegraph Company, hereinafter called "Western Union," acting by an employee.

On the first day of June, 1942, Mr. Bromberg, a man close to 87 years of age, resided at the Congress Hotel in Portland, Oregon. On that date, at about 3:30 P. M., one Genevieve Cline, hereinafter called "Genevieve," employed by Western Union to pick up and deliver messages in the downtown district of Portland, Oregon, was standing at the main desk in the lobby of the Congress Hotel, picking up or delivering a telegram. Mr. Bromberg came up and stood to the rear of Genevieve, either directly behind her or a bit to one side, waiting to step up to the desk and ask for his mail. Upon leaving her position at the hotel desk, Genevieve brushed or bumped into Mr. Bromberg, of whose presence she was not aware, following which contact he fell to the floor of the hotel lobby and sustained the injuries complained of.

In his deposition before trial, taken on December 7, 1942, Mr. Bromberg testified that Genevieve put her hands on his chest and threw him to the floor (Tr. 98-99). At the trial on March 11, 1943, Mr. Bromberg testified that Genevieve got a hold of his throat and pulled and gave him a forcible push causing him to fall to the floor (Tr. 54). Appellee's attorney repudiated both those versions, in the following language: "I want to say, as Mr. Bromberg's attorney, it is not our contention that this young lady took him with her hand" (Tr. 54).

The contention of Mr. Bromberg, as set forth in Paragraph II of his complaint (Tr. 3), is that Genevieve "carelessly, recklessly and negligently made a

sudden and abrupt turn from said desk and walked directly into and against the plaintiff, knocking him to the floor of said hotel lobby and causing the injuries hereinafter described."

In its amended answer to the complaint, Western Union sets up two separate defenses (Tr. 5-6). The first defense is a denial of the material allegations of the complaint. The second defense is that Mr. Bromberg was guilty of contributory negligence, in that he carelessly and negligently, without warning or notice of any kind to Genevieve, placed himself in and remained in such a position in relation to her as to cause her to brush or bump into him when she turned to leave the hotel desk.

In connection with its first defense Western Union contends (a) that Genevieve was not negligent, and (b) that even if Genevieve were negligent in coming in contact with Mr. Bromberg, Western Union, as a matter of law, would not be liable to Mr. Bromberg, because the Congress Hotel lobby is a public place at which Genevieve was present in the exercise of a public right and was using only her body and not any vehicle or instrumentality furnished by Western Union.

In his complaint Mr. Bromberg alleged and asked for only \$1,413.70 special damages by reason of being caused to incur expenses for hospital, nursing, physicians, X-rays, rest home, ambulance and wheel chair (Paragraph IV of the Complaint, Tr. 4). At the Pre-Trial conference, and in the Pre-Trial order (Tr. 9),

which was signed and entered on the day of the trial, Mr. Bromberg alleged and claimed only \$1,413.70 special damages. At the trial Mrs. Bromberg proved items in excess of the sum claimed, and judgment was given for him against Western Union for \$1,760.70 special damages (Tr. 16). No motion was ever made to amend the complaint or the Pre-Trial order, and Western Union contends that in any event Mr. Bromberg should not have been given judgment for special damages in excess of \$1,413.70.

The Pre-Trial order was made and entered on March 11, 1943 (Tr. 11). The case came on for trial on the same day. The testimony and proceedings at the trial are found on pages 26 to 116 of the Transcript of Record.

At the conclusion of Mr. Bromberg's case, Western Union moved to dismiss the action on the following grounds: (1) that there had been no negligence on the part of Genevieve; (2) that Mr. Bromberg was contributorily negligent; (3) that even if Genevieve were negligent, the rule of respondeat superior did not apply because she was at a place where she had a right to be on her own account; (4) that the testimony of Mr. Bromberg tended to show a deliberate act on the part of Genevieve (for which Western Union would not here be liable), rather than a negligent act, as alleged; and (5) that even if Genevieve were negligent, injury to anyone by her action was not reasonably foreseeable (Tr. 72-74).

The Court reserved its decision on this motion (Tr. 74). After the trial the Court announced its decision in favor of Mr. Bromberg. Findings of fact and conclusions of law were entered (Tr. 12-16), and judgment (Tr. 16) was made and entered on March 18, 1943, giving judgment to Mr. Bromberg against Western Union in the sum of "\$2,500.00 as general damages" and the sum of "\$1,760.70 as special damages," together with his costs and disbursements. Thereafter this appeal from the judgment was duly taken (Tr. 17-25).

SPECIFICATIONS OF ERRORS

(1) The trial court erred in finding that Genevieve was negligent and that negligence on her part proximately caused the injuries to Mr. Bromberg (Findings of Fact II, III and V, Tr. 14-15).

(2) The trial court erred in finding that Genevieve "made an abrupt turn and walked directly into and against" Mr. Bromberg (Findings of Fact II and III, Tr. 14).

(3) The trial court erred in finding that Mr. Bromberg was not guilty of any negligence (Findings of Fact IV, Tr. 14).

(4) The trial court erred in concluding that Mr. Bromberg was entitled to recover from Western Union any sum whatever, and in giving judgment against Western Union for any sum whatever (Conclusions of Law I, and Judgment, Tr. 16).

(5) The trial court erred in not granting Western Union's motion to dismiss the action (Tr. 72-74).

(6) The trial court erred in finding that Genevieve, in coming in contact with Mr. Bromberg, was acting for Western Union (Findings of Fact I, III and V, (Tr. 13-15).

(7) The trial court erred in finding that Mr. Bromberg was specially damaged in a sum of more than \$1,413.70, and in concluding that Mr. Bromberg was entitled to recover from Western Union special damages in excess of said sum, and in giving judgment against Western Union for special damages in excess of said sum (Findings of Fact VII, Conclusions of Law I, and Judgment, Tr. 16), in view of the allegations of Paragraph IV of the Complaint (Tr. 4) and in view of the contentions of Mr. Bromberg as defined in the pre-trial order (Tr. 9).

ARGUMENT

In this action Mr. Bromberg seeks to recover damages from Western Union because of personal injuries sustained by him when he fell to the floor of a hotel lobby after a slight, unintentional and accidental contact by Genevieve, a seventeen-year-old Western Union messenger girl.

Of course, in such a situation, Western Union could be held liable only under the principle of *respondet superior*.

Besides Mr. Bromberg and Genevieve, the only eye witness to the accident was Western Union's witness, James Lenhart, the head bell-boy and relief clerk at the Congress Hotel (Tr. 74-88). Mr. Bromberg's testimony in his deposition (Tr. 90-105) and at the trial (Tr. 52-54) was so vague, indefinite, contradictory, and incomplete that it can afford no basis for a recovery.

Mr. Bromberg's attorney was compelled at the trial to repudiate Mr. Bromberg's statements (made in his deposition before the trial and in his testimony at the trial) of a deliberate and intentional act on the part of Genevieve (Tr. 54). Genevieve's testimony that she did not know of the presence of Mr. Bromberg (or anyone else) behind her until she actually came in contact with him (Tr. 57-58, 63), stands uncontradicted. There were no other persons anywhere near them in the lobby (Tr. 58); and there were no pillars or other obstacles to be guarded against (Tr. 59). Genevieve, at the time of contacting Mr. Bromberg, was walking and not running (Tr. 57); and in walking away from the desk she had taken probably one step before she came in contact with him (Tr. 59). When she "brushed against him" (Tr. 57), the impact was so slight that she did not realize there was any possibility of injury to him (Tr. 62); and she had walked on a distance of ten feet before she heard him cry out (Tr. 76-79).

At the time of the accident, Mr. Bromberg was close to 87 years of age (Tr. 44), weighed about 130

pounds (Tr. 51), had impaired hearing (Tr. 36, 91), had fallen before (Tr. 93), walked unsteadily and did not lift his feet but shuffled along with a cane, and at times complained, "I am not walking as well as a baby" (Tr. 44). His physical incapacity was so obvious that a few months prior to the accident the management of the Congress Hotel suggested to Mrs. Hervin, Mr. Bromberg's daughter: "that Mr. Bromberg should not be left at the hotel unattended," that his movements were so slow that it was an inconvenience to the other guests, that they had to hold elevators for him to get on, that he should not be in a commercial hotel, that he was likely to stumble, and that "he probably would be better where there was someone to watch him and care for him" (Tr. 38-39). As a result of this conference, it was arranged for Mr. Bromberg to have his breakfasts in his room (Tr. 40).

It is the contention of Western Union that Mr. Bromberg failed as a matter of law to establish a cause of action, and that the evidence does not warrant a finding that Genevieve was negligent. Moreover, it would seem that under the circumstances of this case, Mr. Bromberg was, as a matter of law, guilty of contributory negligence in being unattended in a public place where there is always the likelihood of unintentional body contacts, and in coming up and standing so close behind Genevieve as to render some bodily contact highly probable when she moved from her position.

At the time of the accident, Genevieve was in a public place where she had a right to be independent-

ly of her employment and she was not using any instrument or vehicle furnished by her employer. This court may well wish to follow the line of authorities holding that the rule of *respondeat superior* should not be applied to hold liable an employer for the "negligent pedestrianism" of its employee, even if Genevieve was in fact negligent and Mr. Bromberg was in fact not guilty of contributory negligence.

In his complaint, Mr. Bromberg claims special damages of \$1,413.70. His contention was renewed and repeated in the Pre-Trial order which became the basis of the proceedings at the trial. Without any attempt to amend his complaint, or amend the Pre-Trial order, which was made on the very day of the trial, Mr. Bromberg obtained a judgment for special damages in the sum of \$1,760.70. If, under the federal rules of civil procedure, the Pre-Trial procedure is to have any validity and effect in defining the issues in a case, Mr. Bromberg, under the circumstances, should not, in any event, be permitted to recover more than \$1,413.70 in special damages.

Before proceeding further, certain legal principles should be mentioned:

I.

NEGLIGENCE IS A FAILURE TO DO WHAT A REASONABLY PRUDENT PERSON WOULD ORDINARILY HAVE DONE UNDER THE CIRCUMSTANCES, OR DOING WHAT SUCH PERSON, UNDER EXISTING CIRCUMSTANCES, WOULD NOT HAVE DONE.

45 C. J. 628.

38 Am. Jur. 643.

Interstate Circuit v. LeNormand, 100 F. (2d) 160, 161.

Rice v. City of Portland, 141 Or. 205, 213; 7 Pac. (2d) 989; 17 Pac. (2d) 562.

II.

THE REQUIRED DEGREE OF CARE IS ALWAYS GRADUATED ACCORDING TO THE DANGER ATTENDING THE ACTIVITY BEING PURSUED.

45 C. J. 698.

38 Am. Jur. 677-8.

The W. D. Anderson, 17 F. Supp. 754, 758; affirmed 94 F. (2d) 377; c.d. 303 U.S. 658; 82 L. Ed. 1117; 58 S. Ct. 764.

Sullivan v. Mt. States Power Company, 139 Or. 282, 298; 9 Pac. (2d) 1038.

Peck v. Gerber, 154 Or. 126, 132; 59 Pac. (2d) 675.

Shobert v. May, 40 Or. 68, 70; 66 Pac. 466.

Carroll v. Grande Ronde Electric Company, 47 Or. 424, 433; 84 Pac. 389.

III.

IN ORDER FOR AN ACT TO CONSTITUTE NEGLIGENCE, IT MUST BE REASONABLY FORESEEABLE TO A PERSON IN THE POSITION OF THE ACTOR THAT HIS ACT WOULD RESULT IN SOME INJURY TO ANOTHER.

45 C. J. 651-2.

38 Am. Jur. 669, 678-9.

Mauney v. Gulf Refining Company, .. Miss...; 9 So. (2d) 780.

Bragg v. Dayton Company, 212 Minn. 491; 4 N.W. (2d) 320.

Shearman and Redfield on Negligence, Rev. Ed. 1941, Sec. 24, page 50.

Ford v. Grand Union Company, 268 N.Y. 243, 254; 197 N.E. 266.

In *Russell v. O. R. & N. Co.*, 54 Or. 128, 137; 102 Pac. 619, the Oregon Supreme Court declared:

"A person is liable for any act the injurious consequence of which an ordinarily prudent man would be likely to foresee and guard against."

In *Leavitt v. Stamp*, 134 Or. 191, 197; 293 Pac. 414, the Oregon Supreme Court pointed out:

"An injury which could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable."

In *Lincoln Gas Company v. Thomas*, 74 Nebr. 257, 260; 104 N.W. 153, the Court said:

"It is of the essence of actionable negligence that the party charged should have knowledge that the act complained of was such an act of omission or commission as might, within the domain of probability, cause such an injury as that complained of."

In *Morrison v. Burgess Company*, 70 N.H. 406, 408; 47 A. 412, the Court said:

"A person is not in fault for not knowing particular facts unless circumstances exist which would put a man of average prudence upon inquiry."

As stated in Volume 2, Restatement of the Law of Torts, page 763:

"In order that an act may be negligent, it is necessary that the actor should realize that it involves

a risk of causing harm to some interest of another, such as the interest in bodily security, which is protected against unintended invasion. But this of itself is not sufficient to make the act negligent. Not only must the act involve a risk, which the actor realizes, or should realize, but the risk which is realized, or should be realized, must be unreasonable."

As pointed out in *Aune v. Oregon Trunk Railway*, 151 Or. 622, 631, 51 Pac. (2d) 663:

"That a person is expected to anticipate and guard against all reasonable consequences, but that he is not expected to anticipate and guard against that which no reasonable man would expect to occur, is well settled."

In *The Ellenor*, 39 F. Supp. 576, 579; affirmed 125 F. (2d) 774, the Court said:

"One is expected to guard against only such dangers as a reasonably prudent person would be reasonably expected to anticipate. Clairvoyancy is not requisite."

38 Am. Jur. 670:

"In other words, the duty to use due care arises from probabilities, rather than from bare possibilities, of danger."

Ft. Smith Gas Company v. Cloud, 75 F. (2d) 413, 415.

Sander v. California-Oregon Power Company, 133 Or. 571, 576; 291 Pac. 365.

38 Am. Jur. 670:

"If the injury could not have been foreseen, it is attributed not to the actor but to the accident."

IV.

A PERSON IS NOT REQUIRED TO EXPECT THAT ANOTHER MAY BE UNABLE TO EXERCISE ORDINARY CARE FOR HIS OWN SAFETY, IN THE ABSENCE OF CIRCUMSTANCES PUTTING HIM UPON NOTICE OF SUCH CONDITION.

38 Am. Jur. 683.

Worthington v. Meneer, 96 Ala. 310, 315-16; 11 So. 72.

In 45 C. J. 704, it is said:

“In the absence of anything which should reasonably suggest such a condition, one is not required to anticipate that another may, for some reason, be unable to exercise ordinary care for his own safety, but the duty to exercise special care with respect to a person who is for any reason unable to take such care of himself as the normal person might, arises only where there is actual or imputed knowledge of the incapacity.”

Under this principle, *even a common carrier*, which does not know of the infirmity of the injured person is held not liable:

Louisville, etc. v. Turner, 219 Ky. 92, 99; 292 S.W. 758, 761.

Cook v. Leavenworth, 101 Kan. 103, 107; 165 Pac. 803, 804.

Virginia Railway Company v. Boswell, 82 Va. 932, 936; 7 S.E. 383, 384.

International, etc. Co. v. Garcia, 13 S.W. 223, 224 (Tex.).

Bennett v. Metropolitan Co., 122 Mo. App. 703, 712; 99 S.W. 48.

Daily v. Richmond Railway Co., 106 N.C. 301, 307; 11 S.E. 820.

V.

IT IS THE GENERAL RULE THAT ONE WHO VOLUNTARILY PLACES HIMSELF IN, OR REMAINS IN, A POSITION WHICH HE KNOWS, OR WITH REASONABLE CARE SHOULD KNOW, IS DANGEROUS, CANNOT RECOVER FOR THE ENSUING INJURY.

Cooley on Torts (4th Ed.) Sec. 489, page 423.
Straight v. Western Lt. & Pr. Co., 73 Colo. 188,
 191; 214 Pac. 397.

VI.

IF A PERSON "KNOWS THAT HE IS PHYSICALLY INFERIOR IN ANY PARTICULAR, HE IS REQUIRED TO USE HIS REMAINING FACULTIES WITH GREATER DILIGENCE."

Volume 2, Restatement of the Law of Torts,
 page 768.

As stated by the Oregon Supreme Court in *Weinstein v. Wheeler*, 127 Or. 406, 413; 257 Pac. 20; 271 Pac. 733:

"The blind and the halt may use the streets, without being guilty of negligence, if, in so doing, they exercise that degree of care which an ordinary prudent person similarly afflicted would exercise under the same circumstances."

It is said in 38 Am. Jur. 895:

"The fact that a person is afflicted with a physical disability requires him to put forth a greater effort for his own safety than one not disabled, in order to attain the standard of an ordinary

prudent man which the law has established for everybody * * * Those who are deficient in any one of their senses, must all the more diligently use the others. If, for any reason, a person is disabled to see or hear, he is bound to take extraordinary precautions in other ways. A deaf man must exercise his sense of sight with redoubled vigilance."

Musc v. Page, 125 Conn. 219; 4 A. (2d) 329.

Flynn v. Pittsburg Railway Company, 234 Pa. St. 335, 338; 83 A. 207; (near-sighted woman).

Toledo Railway Company v. Hammett, 220 Ill. 9, 13; 77 N.E. 72 (Deaf man).

Smith v. Cincinnati Railway Company, 146 Ky. 568, 572; 143 S.W. 1047. (Deaf man).
45 C. J. 996-7.

Shearman and Redfield on Negligence, (Rev. Ed. 1941), Sec. 107, pages 253-256:

"The plaintiff's own condition may be such as to seriously modify his duty with regard to self-preservation. If he is in the prime of life, active, alert and vigorous, far-sighted and clear headed, he may, without imprudence, take what might theoretically be considered a certain amount of risk, since he would be almost absolutely certain to place himself in no actual danger thereby. On the other hand, if he is old or infirm, lame, sick, or weak * * * he would not be justified in taking a risk which would be nothing to a vigorous and far-sighted man. In other words, every person must use that degree of care which prudent persons of his class, taking all circumstances into account, including health, strength, and habits of body and mind, would use, when acting prudently. * * * While it is a correct legal proposition that one suffering from mental or physical infirmity is only required to use ordinary care to avoid accidents, yet ordinary care in his case im-

poses upon him an increased amount of care, proportioned to his disability, to overcome the greater liability to accidents incurred on that account. * * * Generally, they have the same right to use such highways as others, but in doing so they must exercise an increased degree of care, that is such care as persons of ordinary prudence, so afflicted, would use under like circumstances."

And, as stated in the same work, at page 254, referring to the care required to be used by an infirm person :

"But if such person, knowing his incapacity, needlessly places himself in a position in which danger is probable, without means on his part to avert it, that is negligence. The incapacity of such a person to use care in one direction imposes on him the duty of exercising, for his own protection, a degree of care in other directions that will, as far as possible, compensate for his impaired senses or other disability."

Cogswell v. Oregon R. Co., 6 Or. 417, 424. (Deaf man).

Smith v. Sneller, 345 Pa. St. 68, 71; 26 A. (2d) 452. (Impaired vision).

VII.

THERE IS A LINE OF AUTHORITIES HOLDING THAT AN EMPLOYER IS NOT LIABLE FOR THE "NEGLIGENT PEDESTRIANISM" OF HIS EMPLOYEE.

Phillips v. Western Union Telegraph Company, 270 Mo. 676; 195 S.W. 711.

Ritchey v. Western Union Telegraph Company, 41 S.W. (2d) 628 (Mo. Appeals).

See *Wesolowski v. John Hancock Mutual Life Insurance Company*, 308 Pa. 117; 162 A. 166.

VIII.

A PLAINTIFF IS NOT ENTITLED TO RECOVER SPECIAL DAMAGES IN EXCESS OF THOSE ALLEGED IN HIS COMPLAINT, AND STATED IN THE PRE-TRIAL ORDER.

The Pre-Trial order "limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order, when entered, controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice."

Rule 16, Rules of Civil Procedure.

Stipulations at Pre-Trial proceedings are binding upon the parties and the subsequent course of the action is to be governed by the Stipulations, unless modified at the trial by the court to prevent manifest injustice.

Geopolus v. Mandes, 35 F. Supp. 276, 276-277.

Rule 9(g) of the federal rules of civil procedure provides:

"When items of special damage are claimed, they shall be specifically stated."

This rule was applied in *Radio Electronic Television Corp. v. Bartniew Distributing Corp.*, 32 F. Supp. 431, 432.

This is simply an application of a familiar rule of pleading. *Smith v. Pally*, 130 Or. 282, 290; 279 Pac. 279.

WAS GENEVIEVE NEGLIGENT?

In his complaint, filed September 16, 1942, Mr. Bromberg contended that Genevieve "carelessly, recklessly and negligently made a sudden and abrupt turn from said desk and walked directly into and against the plaintiff, knocking him to the floor of said hotel lobby and causing the injuries hereinafter described" (Complaint, Par. 2, Tr. 3). The Pre-Trial Order, made and entered March 11, 1943, defines the "Contentions of Parties" in part as follows: "The plaintiff contends that * * * said Genevieve Cline made a sudden and abrupt turn from said desk and walked directly into the plaintiff, knocking him to the floor * * *." (Tr. 8). The Trial Court, in its Findings of Fact, Par. II (Tr. 14), found that "after leaving her position at said hotel desk, as aforesaid, the said Genevieve Cline made an abrupt turn and walked directly into and against the plaintiff, knocking him to the floor of the lobby of said hotel." What is the evidence to sustain the allegations of Mr. Bromberg and the findings of the Trial Court?

There were only three witnesses to the accident—Mr. Bromberg, Genevieve and James Lenhart (the head bell-boy and relief clerk). John Goss, the bell-boy called by Mr. Bromberg as a witness, did not actually see the accident although he was in the hotel lobby at the time (Tr. 68). Likewise, the desk-clerk, Mr. Shelton, who was standing just across the desk from Genevieve and Mr. Bromberg, did not see the

accident (Tr. 60). The fact that the attention of neither Shelton nor Goss was attracted by the contact would indicate that it must have been very slight.

Mr. Bromberg's testimony in his deposition (Tr. 90 to 105) and at the trial (Tr. 52-54) was confused and contradictory. When his deposition was taken on December 7, 1942, he testified "I can't remember exactly about what happened" (Tr. 98). In response to repeated questions, he then testified that Genevieve "gave me a strong push in my chest and threw me to the floor" (Tr. 98). The unsuccessful attempts of Mr. Bromberg's own attorney and of the attorney for Western Union to have him tell how the accident happened are set forth on pages 94 to 105 of the Transcript of Record. At no time during this elaborate questioning by two attorneys at the taking of the deposition, did Mr. Bromberg state that Genevieve "made a sudden and abrupt turn from said desk." He stated that he was standing behind her and that she turned around and shoved him down (Tr. 100), and that she was walking, not running (Tr. 101).

At the trial on March 11, 1943, Mr. Bromberg was questioned carefully by his own attorney (Tr. 52-54), but at no time did he testify that Genevieve made a sudden and abrupt turn from the hotel desk. His testimony was "Well, I stood near that lady to wait, then she came close to me and just got a hold of my throat and pulled and gave me a forcible push and I fell with my floor—with my back to the floor and I broke my hip" (Tr. 54).

Mr. Bromberg's two versions of a deliberate assault and battery by Genevieve were repudiated by his own attorney in the following language: "I want to say, as Mr. Bromberg's attorney, it is not our contention that this young lady took him with her hand" (Tr. 54).

Mr. Bromberg's attorney was compelled to call Genevieve as plaintiff's own witness. Her testimony will be found on pages 54 to 67 of the Transcript of Record. Nowhere in her testimony will be found any evidence that she made a sudden and abrupt turn from the hotel desk or that she turned in any other than a perfectly normal way. Genevieve could not remember whether she turned to the right or left, but thought she brushed Mr. Bromberg before she had completely turned around while her head was turned away from him (Tr. 64). Genevieve testified that she was not in a hurry (Tr. 65), and that when she moved away from the desk she was walking, not running (Tr. 57). Mr. Bromberg was so close behind her that she took probably one step before she came in contact with him (Tr. 59). She did not know that anyone was beside or behind her until the contact (Tr. 57-58, 63).

James Lenhart, the only other eye witness to the accident, and who was standing a short distance away by the elevator, testified that Genevieve "turned I am sure to her left and kind of made a circle around him. * * * She turned and went around behind him and at that time she was between Mr. Bromberg and

myself. Now, she might have brushed him but if she did it was very lightly, because she went on right by him and he fell and she stopped * * *” (Tr. 76). “She was ten feet past him when he fell” (Tr. 79). Lenhart testified that at the time he was not aware that she had come in contact with Mr. Bromberg and that, although he was looking at them at the time, it did not appear to him that she and Mr. Bromberg actually came in contact (Tr. 77-78). Nowhere in his testimony does Lenhart state that Genevieve made a sudden and abrupt turn from the hotel desk, nor is it stated anywhere in the testimony that the movements of Genevieve were other than those of a reasonably prudent person.

Genevieve’s testimony that she did not know that Mr. Bromberg or anyone else was standing near her is uncontradicted. Even if she had known that someone was standing behind her, there was certainly nothing in the situation to put her upon notice that the person was an enfeebled old gentleman unsteady on his feet. Genevieve had the right to expect that anyone in a public place, such as the lobby of a commercial hotel in a large city, would be able to withstand the almost inevitable brushing or jostling that occurs in public places.

Even if Genevieve had made a sudden and abrupt turn from the hotel desk, even if she had spun around, it was not reasonably foreseeable that such action would cause someone to fall, because she did not know and had no reason to know that anyone was

behind her. The delivering of a telegram at a hotel desk is not such an inherently dangerous activity as to require a higher than ordinary standard of care.

As so aptly stated in 38 Am. Jur., page 670 (supra): "The duty to use due care arises from probabilities, rather than from bare possibilities, of danger."

And, as stated in *Mauney v. Gulf Refining Company*, ... Miss. ...; 9 So. (2d) 780, 780-1: "The rule is firmly established in this State, as in nearly all the common law States, that in order that a person who does a particular act, which results in injury to another, shall be liable therefor, the act must be of such character, and done in such a situation, that the person doing it should reasonably have anticipated that some injury to another will probably result therefrom, (citing cases); but that the actor is not bound to a prevision or anticipation which would include an unusual, improbable or extraordinary occurrence, although such happening is within the range of possibilities. * * * The area within which liability is imposed is that which is within the circle of reasonable foreseeability using the original point at which the negligent act was committed or became operative, and thence looking in every direction as the semi-diameters of the circle and those injuries which from this point could or should have been reasonably foreseen as something likely to happen, are within the field of liability, while those which although foreseeable, were foreseeable only as remote possibilities,

those only slightly probable, are beyond and not within the circle—in all of which time, place and circumstance play their respective and important parts. * * The reasonable man, then, to whose ideal behavior we are to look as the standard of duty will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible.”

The Minnesota Supreme Court states the rule this way, in *Bragg v. Dayton Company*, 212 Minn. 491; 4 N.W. (2d) 320: “If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all.”

The testimony of all of the witnesses, including Mr. Bromberg himself, unites in establishing one central fact in this case, namely, that Mr. Bromberg was standing very close behind Genevieve. Lenhart, who was some distance away, standing by the elevator, testified that Mr. Bromberg “shuffled from the elevator over and stood behind the girl I should say about three feet behind her and just a little bit to the right” (Tr. 76). Genevieve testified that she could not say exactly how far behind her Mr. Bromberg was, but it was her best judgment that he was “about 2 or 3 steps * * * something like that” (Tr. 56); that he was standing “almost immediately” to her rear; and that she took probably only one step in walking away from the desk before she came in contact with him (Tr. 59). When his deposition was taken on December 7, 1942, Mr. Bromberg testified as follows (Tr. 104):

“Q. How far away from you was the girl when you were standing there waiting to talk to the clerk?

A. Right by the side of her.

Q. Would you say you were almost touching her? Were you that close?

A. I don't remember anything about close; right by her side.

Q. Not very far away? A. No.

Q. Would you say that you were as much as a foot away, twelve inches away?

A. Between?

Q. Yes.

A. I didn't know the measure, but I know I was close to her. It wasn't far.

Q. You were quite close to her? A. Close.”

The testimony of all three of these witnesses shows that Genevieve came in contact with Mr. Bromberg in the very act of turning away from the desk, and that anyone, particularly a person without knowledge of the presence of Mr. Bromberg, in turning away from the desk in an ordinary and reasonable manner, would have come in contact with Mr. Bromberg. It would not be reasonable to require a person in the position of Genevieve to foresee and guard against the presence of a person in such close proximity, particularly a person so enfeebled as not to be able to withstand the inevitable contacts between pedestrians experienced in public places.

So, we say that the finding of negligence on the part of Genevieve is a misapplication of the law to the facts.

WAS MR. BROMBERG NEGLIGENT?

At the time of the accident Mr. Bromberg was close to 87 years of age (Tr. 44), slow and unsteady on his feet (Tr. 37-39). His daughter, Mrs. Hervin, testified "he wasn't what I would call strong. He used a cane and depended upon us often to give him our arm if he walked any distance * * *." (Tr. 27). Mr. Bromberg's hearing was impaired (Tr. 36; 91); and he sometimes walked with a sort of a shuffling or dragging of his feet (Tr. 37). He described that as "not walking as well as a baby" (Tr. 44). A few months prior to the accident, the management of the Congress Hotel, where he was living and where the accident occurred, suggested to Mr. Bromberg's daughter, Mrs. Hervin, that he should not be left at the hotel unattended. The manager "suggested that his movements were slow; that when he came to the elevator they had to wait; it was an inconvenience to some of the other patrons of the hotel, and that she thought it would be better probably if he stayed in a hotel that wasn't a commercial hotel" (Tr. 38). The manager indicated "that he probably would be better where there was someone to watch him and care for him * * * . They said he might be inclined to stumble over something" (Tr. 39). Of course Western Union regrets the accident and has the utmost

sympathy for Mr. Bromberg and his family, but Mr. Bromberg should have realized the risk he was taking in his enfeebled condition in mingling, unattended, with the people in the hotel lobby. His family, who had the care of him, were specifically warned of the danger a short while before the accident and yet they chose to permit him to remain at the hotel unattended, a danger to himself and a hazard to the public.

We have already referred to the testimony that Mr. Bromberg, without Genevieve's knowledge, came and stood very close behind her while she was at the hotel desk, and that she came in contact with him immediately upon turning away from the desk. We respectfully submit that when Mr. Bromberg, knowing his own enfeebled condition, placed himself so close behind Genevieve he was guilty of contributory negligence as a matter of law.

Knowing of his own weakened condition, Mr. Bromberg was required "to put forth a greater effort for his own safety than one not disabled." As a man whose hearing was impaired, he was required "to exercise his sense of sight with redoubled vigilance" (38 Am. Jur. 895). As a man who was old and feeble, he was not justified in taking a risk which would be nothing to a man who was vigorous (Shearman and Redfield on Negligence, Sec. 107, p. 253). How truly applies to him the language of the same text writers found on page 254: "If such person, knowing his incapacity, needlessly places himself in a position in

which danger is probable, without means on his part to avert it, that is negligence.”

THE RULE IN THE PHILLIPS CASE

Mr. Bromberg is seeking to hold Western Union liable for the alleged negligence of its employee, Genevieve, in coming into contact with Mr. Bromberg as she was turning away from a hotel desk. Genevieve was not using any instrumentality furnished by her employer, such as a bicycle or automobile, at the time of the accident, but merely her own two feet. There are a number of cases holding that under such a state of facts the employer is not responsible, even if the employee be negligent.

In *Phillips v. Western Union Telegraph Company*, 270 Mo. 676; 195 S.W. 711, the Supreme Court of Missouri had before it an action for injuries suffered by a woman who was knocked down by a messenger boy. The boy, while engaged in delivering a telegram, snatched a newspaper from a newsboy, and, while running away with it, collided with the plaintiff. The court set aside a judgment for the woman, and stated (195 S.W. 712-713):

“In going into the consideration of this case it is well to have in mind that the boy who caused the injury which is the subject of the suit was not traveling on the street by permission of his co-defendant, but in the exercise of a public right valuable to himself as a facility for gaining his livelihood as well as to his employer. Had he not possessed this right his employer could not have

conferred it nor taken it away. It went with his service as far as it was necessary to the performance of the duty involved, and no further. In all other respects and for all other purposes it remained his own. It was, like his health and strength, a part of his own equipment for the service in which he was engaged. We cannot arbitrarily assume that by the terms of his employment he was forbidden to seek, while on these trips, his own pleasure or profit in any manner consistent with the performance of his whole conventional duty, nor was the defendant under any obligation to so restrain his liberty of action, in the ordinary use of the public easement, although, should it authorize him to commit a wrong, as by inciting him to dangerous speed in a crowd, it would be liable for the consequences * * *.

“On the other hand, neither beasts or inanimate things participate in these public uses of their own right, but only have status in the public highway by right of their owners. * * * Had this boy been furnished by the defendant with a horse to ride or an automobile to transport him in the performance of his duties, his management of these facilities would have been the management of his master, which would have been liable for his acts and omissions in such management.”

The *Phillips* case was followed by the Kansas City (Mo.) Court of Appeals in *Ritchey v. Western Union Telegraph Company*, 41 S.W. (2d) 628. In the *Ritchey* case a messenger boy ran out of the doorway of his employer's office and collided with and injured a woman walking along the sidewalk. The Court affirmed a judgment for the defendant and said:

“The facts in this case are in legal effect the same as the facts in the case of *Phillips v. Western Union Telegraph Company*.”

In *Wesolowski v. John Hancock Mutual Life Insurance Company*, 308 Pa. 117; 162 A. 166, a boy on a bicycle was injured as the result of the negligent operation of an automobile by the defendant's employee. The defendant company did not furnish the car or require its use. The Supreme Court of Pennsylvania affirmed a judgment in favor of the defendant, notwithstanding a verdict for plaintiff, and held (162 A. 167) :

"In the case before us the defendant had no control over Adams' car. It was in no position to require him to use it, for the use of his car was no part of his contract of service. It could not direct him when, where, or how to drive his car. It had no more control of Adams' car in which he transported himself than it had of the shoes he used in walking from patron to patron. * * * If Adams had chosen to walk from person to person with whom he had his employer's business to transact and in walking he had negligently knocked over and injured another pedestrian, it could not reasonably be contended that his employer should respond in damages for Adams' negligent pedestrianism. So to hold would be to construe the phrase '*respondeat superior*' beyond its fundamental meaning and to carry its principle to absurd lengths and to consequences forbidden by every sound consideration of public policy."

EXCESSIVE SPECIAL DAMAGES

In his complaint, Mr. Bromberg alleged only \$1,413.70 special damages by reason of expenses for hospital, nursing, physicians, X-rays, rest home, ambulance, and wheel chair (Par. IV of Complaint, Tr. 4).

At the Pre-Trial conferences, and in the Pre-Trial Order (Tr. 9), this claim of only \$1,413.70 special damages was repeated. At the trial Mr. Bromberg proved an amount in excess of the sum claimed, and judgment was given for him for \$1,760.70 special damages (Tr. 16). No motion was made to amend the complaint or the Pre-Trial Order, and we contend that Mr. Bromberg, in any event, should not have been given judgment for special damages in excess of \$1,413.70.

Under the old practice in the Federal District Court, and certainly under the practice in the courts of Oregon, a plaintiff would not have been entitled to recover a larger sum in special damages than he had alleged in his complaint, even though he proved a greater amount at the trial, unless he amended his complaint.

Rule 16 of the Federal Rules of Civil Procedure authorizes Pre-Trial procedure for the simplification of the issues and for the consideration of such other matters as may aid in the disposition of the action. The rule then provides:

“The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.”

In *Geopolus v. Mandes*, 35 F. Supp. 276, 277, the United States District Court for the District of Columbia held that stipulations at Pre-Trial proceedings are binding upon the parties and the subsequent course of the action is to be governed by the stipulations unless modified by the court to prevent manifest injustice.

Rule 9(g) provides:

“When items of special damage are claimed, they shall be specifically stated.”

This rule was applied in *Radio Electronics Television Corporation v. Bartniew Distributing Corporation*, 32 F. Supp. 431, where the United States District Court for the Southern District of New York held (page 432):

“If the plaintiff has suffered special damages he should have alleged it.”

We submit that orderly procedure requires that a plaintiff's recovery of special damages should be limited to the amount of special damages alleged in the complaint and in the Pre-Trial Order.

CONCLUSION

Mr. Bromberg is entitled to recover damages from Western Union only if he can establish that his injuries were the direct and proximate result of negligence of Genevieve, Western Union's employee, and not the result of his own negligence. Western Union was not an insurer of the safety of Mr. Bromberg.

What standard of care was demanded of Genevieve? Was she required to anticipate that an enfeebled old man, unsteady on his feet, would, without giving her any indication of his presence, take a position so closely behind her that in the very act of turning away from the desk she would contact him in a manner that would cause him injury? We can hardly believe that a reasonably prudent person in Genevieve's place could have foreseen the accident which is the subject of this action.

Mr. Bromberg knew of the presence of Genevieve, but Genevieve did not know of the presence of Mr. Bromberg. Mr. Bromberg knew that he was a man 87 years of age, slow of movement, and unsteady on his feet. He should have known that in placing himself so close behind Genevieve he was putting himself in a position from which he could not extricate himself in the event she made a sharp turn from the desk. He knew, or should have known of any danger that existed, but she did not and could not know.

We submit that Mr. Bromberg's unfortunate injury was the result, not of negligence of Genevieve, but of his own negligence. The judgment appealed from permits a recovery without a showing of actionable negligence. In legal effect it makes Western Union the insurer of the safety of this enfeebled old gentleman.

Even assuming that Genevieve was negligent and that Mr. Bromberg was not, there is authority for holding that her employer is not responsible for any negligence on her part in using her own legs and body in a public place where she had the right to be; and even assuming that Western Union were to be held liable in this case, judgment by way of special damages should not be for a greater sum than \$1,413.70.

Respectfully submitted,

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

WESTERN UNION TELEGRAPH COMPANY,
a corporation,

Appellant,

vs.

I. BROMBERG,

Appellee.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the United
States for the District of Oregon.

HON. CLAUDE MCCOLLOCH, *District Judge.*

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WESTERN UNION TELEGRAPH COMPANY,
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BRIEF OF APPELLEE

Upon Appeal from the District Court of the United
States for the District of Oregon.

HON. CLAUDE MCCOLLOCH, *District Judge.*

STATEMENT OF THE CASE

This is an appeal from a judgment rendered by the Hon. Claude McColloch sitting without a jury in favor of the appellee in an action brought by him against appellant to recover for personal injuries sustained by appellee as a result of being knocked down by appellant's employee.

For the sake of clarity, we shall refer in this brief to the appellee as Mr. Bromberg, to the appellant as Western Union and to the appellant's employee as Genevieve Cline.

The accident occurred on June 1, 1942. At that time Mr. Bromberg was 86 years old. He resided at the Congress Hotel in Portland, Oregon. (Tr. 52)

On the date in question Mr. Bromberg desired to secure his mail at the main desk of the hotel. When he approached said desk, Genevieve Cline, a messenger employed by Western Union, was at the desk transacting business with the clerk on behalf of her employer. She was either delivering or picking up a telegram. She was wearing a Western Union coat. (Tr. 53, 55, 56)

Mr. Bromberg stopped to the rear and a bit to the side of said Western Union messenger waiting his turn to step to the desk and ask for his mail. (Tr. 56, 76) After completing her business with the clerk, Genevieve Cline turned abruptly about and walked directly into Mr. Bromberg, who was a slight man, knocking him to the floor and causing him to suffer personal injuries, including a broken hip. (Tr. 56, 57, 68, 47)

Subsequently, Mr. Bromberg filed an action against Western Union for the personal injuries suffered on account of the negligence of its messenger, Genevieve Cline. Western Union filed an Answer admitting that Genevieve Cline at the time of the accident was its employee acting in the course of her employment for

Western Union and in the furtherance of its business, but denying that Mr. Bromberg was injured or that Genevieve Cline was negligent. (Tr. 70)

Subsequently, Western Union filed an Amended Answer which was the same as its original Answer except that an affirmative defense of contributory negligence was added. (Tr. 5)

The case was ultimately tried before Judge Claude McColloch without a jury. He found that Genevieve Cline was negligent, that she was acting in the course of her employment for Western Union at the time of the accident, that Mr. Bromberg was not guilty of contributory negligence and that Mr. Bromberg was injured. (Tr. 12) Based upon appropriate findings, Judge McColloch rendered judgment in favor of Mr. Bromberg for the sum of \$2500.00 general damages and \$1760.70 special damages. (Tr. 16)

It apparently is now the contention of Western Union that this case does not involve questions of fact but questions of law and that by reason thereof Western Union cannot be held responsible. Such a contention has no merit whatsoever. Western Union is not only bound by its Answer in which it was admitted that Genevieve Cline was acting in the course of her employment at the time of the accident but her testimony unqualifiedly establishes the point also. Moreover, the pre-trial order which was agreed upon by both parties states that at the time Genevieve Cline was "engaged in the scope of her duties". (Tr. 8)

Thus, this case involved questions of fact, purely and simply, concerning negligence, contributory negligence and injury. With the trial court sitting as a jury and finding in favor of Mr. Bromberg upon these questions of fact, it is difficult to perceive how Western Union can prosecute this appeal with sincerity.

We could, and in order to lighten the burdens of this court probably should, rest this Brief upon Rule 52 (a) of the Federal Rules of Civil Procedure which provides that:

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

However, in view of the tortured effort of Western Union to escape its lawful liability incurred through the negligence of its employee, we shall endeavor to provide this court with some pertinent authorities supporting the judgment herein.

SUMMARY OF PRINCIPAL POINTS INVOLVED

1. Questions of negligence, contributory negligence and proximate cause are ordinarily questions of fact.

2. An employer is responsible for the acts of its employee committed by the employee while acting in the course of employment and in the furtherance of the employer's business.

3. The fact that the employee is a pedestrian at the time of the accident does not in any way change or alter the employer's liability.

ARGUMENT

We shall confine ourselves herein to those specific points set forth in Appellant's Brief.

WAS GENEVIEVE (CLINE) NEGLIGENCE?

Genevieve Cline stood at the main desk of the Congress Hotel in Portland on June 1, 1942, either picking up or delivering a telegram for Western Union. (Tr. 53, 55, 56) After completing her business at the desk, she turned abruptly and almost completely about and walked directly into Mr. Bromberg knocking him to the floor and causing him to suffer serious injuries, including a broken hip. (Tr. 56, 57, 68, 47). Mr. Bromberg was behind her two or three steps according to her (Tr. 56) or about three feet according to appellant's witness, James Lenhart. (Tr. 76) Mr. Bromberg was standing behind her and a little bit to one side. (Tr. 56, 76)

The hotel lobby was of a considerable area and there were no other persons and no posts or pillars or baggage which made it necessary for her to walk into Mr. Bromberg. (Tr. 58, 78) There was "plenty of room" for Genevieve Cline to have walked without coming in contact with Mr. Bromberg. (Tr. 58)

By her own testimony, Genevieve Cline conclusively showed that she must not have kept any lookout at all at the time because although she walked into Mr. Bromberg, she did not know of his presence until the contact and she didn't know whether she was

bumping into a man or a woman. (Tr. 57, 58)

Immediately after the accident and while Mr. Bromberg was being helped up, Genevieve Cline stated, "I am sorry for knocking you down." (Tr. 60, 68)

Under such circumstances how can it be argued that Genevieve Cline was free from negligence as a matter of law?

In *Schediwy vs. McDermott, et al.*, 298 Pac. 107, recovery was allowed the plaintiff who was walking on a sidewalk and was collided with about two and one-half feet from the building line by an employee of a wholesale meat dealer who had just emerged from a side entrance to the market onto the sidewalk. The court said in part as follows:

"In the absence of a prohibitory statute or ordinance to the contrary a pedestrian upon a lane or walk used by foot travelers (i. e., a sidewalk) has the right to come and go in any direction he or she sees fit and at any pace or gait that may suit the fancy or the aim or purpose of the pedestrian, but the pace and direction must be in accordance with the interest of others who may lawfully be using the sidewalk or lane. A pedestrian must use a degree of care, precaution, and vigilance which the circumstances justly demand. One is bound to anticipate and guard against what usually happens, but is not required to anticipate or guard against what is unusual or unlikely to happen. In this case it was for the jury to determine if such care and vigilance was used. We find evidence that warranted the jurors' view upon this subject.

"Souza was an employee and engaged within the scope of the business of the other defendants

at the time of the accident. They are therefore liable."

In *Price vs. Simon*, 49 Atl. 689, an iceman in returning to the ice wagon from a house delivery ran into a small child and cut the child's hand and head with the ice tongs. In the ensuing action the plaintiff was nonsuited in the District Court which was affirmed by the Court of Common Pleas of Camden County, New Jersey, but the Supreme Court of New Jersey reversed both lower courts and held that the question was one of fact for the jury. On the basis of the facts mentioned, the court held that the employee's negligence was clearly for the jury and then went on to say in connection with the employer's liability in part as follows:

"The liability of the master for the negligent act of the servant is solved by determining whether the injury was inflicted while the servant was performing an act in the course of his employment by the master . . . He could not conduct the business in which he was employed without going to the customer's house and returning to the wagon. In doing these acts, he represented the master, and for his negligence the master is liable."

In *Ryan vs. Keane, et al.*, 98 N.E. 590, a stableman while walking across the yard jostled and caused to fall the plaintiff who was also crossing the yard to a wagon which he had hired. The stableman's employers were sued and claimed as does Western Union here that the stableman was not negligent and that in any event they were not responsible for his acts

as a pedestrian. The Supreme Court of Massachusetts in rejecting both contentions stated:

“The jury were warranted in finding that Boylan was acting within the scope of his employment at the time when he ran into the plaintiff. Probably this would not be questioned if he were driving the horse at the time and drove the wagon against the plaintiff. In the act of returning to the stable he was doing what he was ordered to do, and his purpose was to perform the work of his employer for which he was engaged. He was none the less acting in the course of his employment because his method of performing his duty was careless; and if in hurrying to do his work at a busy hour in the morning he carelessly or wilfully jostled against and injured the plaintiff, the defendants are liable for his act. The evidence does not show that Boylan assaulted the plaintiff wilfully, or that he was actuated by ill will or by a desire to carry out any purpose of his own, and the judge’s charge fully protected the rights of the defendants in this regard.”

It is to be noted that in the court’s statement of the facts in the foregoing case, it is mentioned that the stableman jostled the plaintiff “when he had ample unobstructed space in which to pass.”

Recovery was allowed the plaintiff against a railroad company where the plaintiff was injured by a brakeman who ran against and knocked him under a moving train in *Missouri, K. & T. Ry. Co. of Texas vs. Edwards*, 67 S.W. 891.

In fact the principle that a person is liable for his negligent pedestrianism is so firmly ingrained in our jurisprudence that no appeal was taken on be-

half of the servant in a case of this kind occurring on a sidewalk in San Francisco in the case of *Tighe vs. Ad Chong*, 112 Pac. (2d) 20. This decision will be discussed at some length under another point in this Brief.

Western Union also argues that Genevieve Cline was not negligent because the injury to Mr. Bromberg was not foreseeable by her.

It is not necessary in order to bind a person for his negligent act that he foresee the particular injury or result that may obtain. It is sufficient if it could be reasonably anticipated that some injury might result from the act complained of.

The cornerstone case in Oregon on the question of foreseeability and proximate cause is *Miami Quarry Company vs. Seaborg Packing Company*, 103 Ore. 362, 204 Pac. 492.

In that case the defendant's barge was not securely fastened, keeping in mind the actions of the tide and wind, and as a result broke loose and was carried out of Yaquina Bay past a jetty being constructed therein and into the ocean. The following morning the ocean waves brought the barge back in where it was beached and then towards the jetty and dashed it against the same, damaging the jetty and knocking a pile driver stationed on the jetty into the water where it was completely lost.

In affirming judgment for the owner of the pile driver against the owner of the barge, the Supreme

Court of Oregon stated:

"Defendant contends that the omissions of which plaintiff complains were not the proximate cause of the injury for which plaintiff seeks damage. In support of this contention, defendant argues that the injury complained of could not have been foreseen or reasonably anticipated by a person of ordinary foresight and prudence, happening as it did, after the barge had floated out to sea without striking the jetty, and after it had been cast upon the beach south thereof; that a reasonably prudent man could not foresee that the action of the wind and waves, in connection with the eddy south of the jetty, would drive the barge, or a section thereof, in a direction opposite to the ocean currents and against the jetty; and that the rough sea and the eddy created by the jetty constituted an intervening cause and the proximate cause of plaintiff's injury and resulting damage.

"1. A widely quoted definition of proximate cause is the following:

"The proximate cause of an injury is that cause which in natural and continuance sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred': 22 R.C.L. 110.

"2. It was the duty of the defendant to exercise reasonable care to secure its barge to meet conditions that might naturally be expected, such as high tides, changes of tides and tempestuous weather, rendering the barge liable to float and collide with other craft or structures in its course: 11 Corpus Juris 1095, 1098, and notes. There was evidence that defendant did not fully discharge this duty.

"3. Ordinarily the question of whether a particular act was the proximate cause of the injury

complained of is one for decision by the jury, and it is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of proximate cause becomes one of law for the court: (Citing authority)

“4. In order to constitute a particular act the proximate cause of the injury, it is not essential that the precise injury for which recovery is sought should have been foreseen; it is sufficient if the defendant could have reasonably anticipated that some injury might result from the omission of which complaint is made: 22 R.C.L. 125, 126.”

Again in *Bevin vs. O. W. R. & N. Co.*, 136 Ore. 18, 298 Pac. 204, wherein the plaintiff was injured by being struck in the eye by a small particle of rock which glanced from an allegedly defective shovel blade which the plaintiff was using to cut down thistles, the Oregon Supreme Court stated:

“We first inquire: Is there any substantial evidence tending to show that the alleged negligence was the proximate cause of the injury? Ordinarily, the question of proximate cause is for the jury to determine. The court is warranted in withdrawing this issue from the jury only when it can say that no reasonable inference that the alleged negligence caused or produced the injury can be deduced from the evidence. * * * In other words, the court can determine the question of proximate cause as a matter of law only when it can say, after a review of the entire evidence, that no reasonable man would infer from the facts proved that the alleged negligence proximately caused the injury. While it is well established that a jury will not be permitted to enter the realm of speculation or conjecture in deter-

mining whether the defendant may or may not have been guilty of negligence, it is equally well settled that, after substantial evidence has been offered tending to show negligence, the court will not usurp the province of the jury by weighing probabilities in an effort to determine whether such negligence was the proximate cause."

Other decisions of the Oregon Supreme Court rejecting Western Union's contention are *Maletis vs. Portland Traction Company*, 160 Ore. 30, 83 Pac. (2d) 141; *Kelly vs. Stout Lumber Company*, 123 Ore. 647, 263 Pac. 881; *Voshall vs. Northern Pacific Terminal Company*, 116 Ore. 237, 240 Pac. 891.

While Genevieve Cline may not have anticipated the specific injury that occurred, she might well have anticipated or foreseen some injury to someone when she abruptly turned from the main desk in a hotel lobby and walked directly into another person without seeing him until the moment of contact and without knowing whether that person was male or female, old or young, large or small.

Whether such an act on her part constitutes negligence under the circumstances and whether it is the proximate cause of the resulting injury are questions peculiarly within the province of the trier of the facts. This is true not only in Oregon, as demonstrated by the decisions above cited, but under the overwhelming weight of authority. In fact, it is elementary.

A very late decision in point from this court is *Sundberg vs. Washington Fish & Oyster Co.*, No. 10,394, decided November 8, 1943.

In order to ascertain what actually transpired at the time of this accident the trial court had Genevieve Cline demonstrate not only the positions which she and Mr. Bromberg were in at the times involved (Tr. 56) but also the manner in which she bumped into him. (Tr. 64) This is real or demonstrative evidence that of course is impossible for an appellate court to have before it but nevertheless must be given due weight in determining the propriety of the finding made by the trier of the fact.

In a case in which the issue of negligence depended upon whether the defendant had provided a suitably safe eyebolt when a hook connected thereto gave way causing injury to a seaman on a barge, the eyebolt in question was exhibited to the jury in open court during the trial but was not before the appellate court on appeal. In affirming a judgment for the plaintiff the Circuit Court of Appeals for the Third Circuit stated:

“The questions of whether or not the eyebolt was defective, and, if it was, whether or not that defect caused the hook to break, which resulted in the plaintiff’s injury, as well as the question of contributory negligence of the plaintiff, were submitted to the jury. The defendant contends that there was no testimony from which the jury could draw the conclusion that the condition of the eyebolt could have caused the hook to break, and even if the eyebolt was bent over, so that only the end of the hook could enter it, and the hook was not seated in its normal position in the eye, the testimony does not justify the conclusion that the hook would have broken more easily in that position than if it had entered the eye fully and

properly to its normal position.

“This contention does not take into consideration the ‘real evidence’ in the case. The jury had before it the hook, and the testimony as to how it was fastened in the eyebolt, and could readily draw its own conclusion. In addition to the usual methods of establishing facts by direct or positive evidence and circumstantial evidence, there is that of ‘self-perception or self-observation.’ We have three classes of evidence: (1) Direct or testimonial evidence; (2) indirect or circumstantial evidence; (3) autoptic preference, or real evidence. Greenleaf on Evidence (16th Ed.) vol. 1, § 13a; Wigmore on Evidence, § 1150 et seq.

‘In a great measure proof of this means (autoptic preference or real evidence) may be more potent than by any other evidence.’ The Modern Law of Evidence by Chamberlayne, § 3588.

‘Inspection is like admission, in that, while not testimony, it is an instrument for dispensing with testimony, and, in a doubtful case, the class of testimony it dispenses with might be a controlling circumstance.’ Gaunt v. State, 50 N. J. Law, 490, 495, 14 Atl. 600, 603.

“The jury had the hook and eyebolt before it, and, being composed of men of common sense and experience, could determine for itself whether or not it was broken because it could not fully and properly enter the eye. It was thus not wholly dependent upon what was said about the hook and eyebolt.”

Philadelphia & R. R. Co. vs. Berg, 274 Fed. 534. Certiorari denied, 257 U.S. 638, 66 L. Ed. 410, 42 Supreme Court 50.

Moreover, at the request of counsel for Western Union, Judge McColloch viewed the scene of the accident. (Tr. 26) This enabled him “better to compre-

hend the evidence adduced upon the trial and apply the testimony to the issues.”

State vs. Sing, 114 Ore. 267, 229 Pac. 921.

After hearing the evidence, viewing the premises and having the scene re-enacted by Western Union's own employee, the trial court found, in part, as follows:

“That on said date and prior thereto the plaintiff, an elderly man, resided at the Congress Hotel, in Portland, Oregon. On said date the said Genevieve Cline while engaged in the scope of her duties for the defendant was standing at the main desk in the lobby of said hotel, either picking up or delivering a telegram or other message of some sort. The plaintiff at said time was standing to the rear of the said Genevieve Cline, either directly behind her or a bit to one side, and was waiting to step to said main desk and ask for his mail. After leaving her position at said hotel desk, as aforesaid, the said Genevieve Cline made an abrupt turn and walked directly into and against the plaintiff, knocking him to the floor of the lobby of said hotel.

“That the defendant by and through the said Genevieve Cline at said time and place was careless, reckless and negligent in abruptly turning from said hotel desk and walking directly into and against plaintiff. That there was ample and sufficient room and space for the said Genevieve Cline to have proceeded on her way in said hotel lobby without coming in contact with the plaintiff had she been keeping a proper lookout and exercising due care for the rights of others in said hotel lobby and particularly the plaintiff.” (Tr. 14)

Rule 52 (a) of the Rules of Civil Procedure following Section 723 of Title 28, U.S.C.A. provides that,

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

“It must be borne in mind that the court below was exercising the functions of a jury, and its findings are of the same force and effect as though the same were embodied in a jury’s special verdict, 28 U.S.C.A. § 773, and cannot be disturbed when there is substantial evidence tending to support the finding

“We are bound by this finding unless the same is clearly erroneous. (Citing Federal rule and interpreting decisions.)”

Luzier’s Inc. vs. Nee, 106 Fed. (2d) 130.

This court stated in a recent decision :

“As was said by Mr. Justice Holmes in *Adamson v. Gilliland*, 242 U.S. 350, 353, 37 Supreme Court 169, 170, 61 L. Ed. 356 (Citing *Davis v. Schwartz*, 155 U.S. 631, 636,, 15 Supreme Court 237, 39 L. Ed. 289), the case is preeminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses ‘depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable’.”

Wittmayer v. U. S., 118 Fed. (2d) 808.

Some of the many other cases in which this court has had occasion to strictly apply and follow the rule under discussion are as follows :

Cherry-Burrell Co. et al. vs. Ray C. Thatcher,
107 Fed. (2d) 65.

Occidental Life Insurance Company vs. Thomas,
107 Fed. (2d) 876.

Maryland Casualty Company vs. Stark, 109
Fed. (2d) 212.

Gates vs. General Casualty Company, 120 Fed.
(2d) 925.

We earnestly submit that the findings made by the trial court instead of being clearly erroneous were the only findings fairly and reasonably to be made from the evidence.

WAS MR. BROMBERG NEGLIGENT?

At the time of this accident Mr. Bromberg was an aged man. He had passed his 86th birthday but had not yet attained 87. He walked with a cane. At times he shuffled and he walked slowly. His hearing was not as good as one of fewer years and as his had once been.

Because of these circumstances Western Union would contend, as we view its theory, that Mr. Bromberg should become a recluse, that he should separate himself from any daily activity of any kind and confine himself so that Western Union messengers wouldn't be exposed to the possibility of knocking him down and hurting him.

Although he was an aged man at the time of this accident, he was rather a remarkable man for his years before he was injured. He continued to main-

tain an office with an insurance company and he walked to this office from his hotel several times a week. (Tr. 28, 29) He was alert mentally. (Tr. 29) He lived alone at the Congress Hotel and he continued to be active in organizations and he attended their meetings. (Tr. 27, 28)

On the day of the accident he went to the lobby of the hotel which was his home and proceeded to the main desk to call for his daily mail. He observed there a young lady who was ahead of him and he stood behind her and a bit to one side until it was his turn.

We have already pointed out earlier in this Brief that Genevieve Cline thought he stood two or three steps behind her and slightly to the side. (Tr. 56) Western Union's witness, James Lenhart, said Mr. Bromberg stood about three feet behind Genevieve Cline and a bit to one side. (Tr. 76)

Does this conduct on the part of Mr. Bromberg spell negligence as a matter of law? What should he have done, stood ten feet behind Western Union's messenger? Should he have tapped her on the shoulder and said, "Don't walk into me and knock me down. Please be careful."?

Mr. Bromberg did what any intelligent, reasonable person would have done. He stood sufficiently behind Genevieve Cline so as not to interfere with her or impede her in leaving and yet close enough to the desk that he could gain the clerk's attention by step-

ping forward a few feet when the clerk had finished with Genevieve Cline. The Supreme Court of Oregon has stated:

"No person or class of persons has an exclusive right to the use of the streets. Public thoroughfares are for the beggar on his crutches as well as the millionaire in his limousine. Neither is it the policy of the law to discriminate against those who suffer physical infirmities. The blind and the halt may use the streets without being guilty of negligence if in so doing they exercise that degree of care which an ordinarily prudent person similarly afflicted would exercise under the same circumstances."

Weinstein vs. Wheeler, 127 Ore. 406, 257 Pac. 20, 271 Pac. 733.

This decision of course pertained to streets and to a blind man thereon. Mr. Bromberg was merely an old man with some of the natural infirmities of old age, and he was in his home, the lobby of the hotel in which he was a permanent resident.

After hearing the evidence in the case and after having Genevieve Cline demonstrate with a court attache the position of Mr. Bromberg and herself at the time (Tr. 56), the trial court found:

"That at said time and place the plaintiff was not guilty of any negligence." (Tr. 14)

In Oregon and generally contributory negligence is a question for the jury or the trier of the fact.

"This court has held over and over again that where there is a dispute as to the facts or where minds might draw different conclusions the question of contributory negligence is for the jury."

Simms vs. Friede Investment Company, 125 Ore. 300, 266 Pac. 910.

“The trial court did not err in submitting the issue of contributory negligence to the jury. We see no need of reviewing authorities on such question. The law in reference thereto is well settled. It is in the application of the law to a particular factual situation that difficulty often arises, and, of course, the decision in each case hinges upon the particular facts involved.”

Whisler vs. U. S. National Bank of Portland, 160 Ore. 10, 82 Pac. (2d) 1079. See also Saylor vs. Enterprise Electric Company, 110 Ore. 231, 222 Pac. 304, 223 Pac. 725; Mas-sor vs. Yates, 137 Ore. 569, 3 Pac. (2d) 784; Callaway vs. Moseley, 131 Fed. (2d) 414.

The defendant has the burden of pleading and proving contributory negligence. It is an affirmative defense. The trial court held that the defense had not been proven, that Mr. Bromberg was not contributorily negligent.

The trial court's finding in that regard was clearly proper under the evidence and was not erroneous in any way.

THE RULE IN THE PHILLIPS CASE

In its desperate effort to escape responsibility herein, Western Union cites the case of Phillips vs. Western Union Telegraph Company, 195 S.W. 711, a Missouri decision that has “no pride of ancestry and no hope of posterity”. In that case a messenger boy employed by Western Union ran along a sidewalk in

St. Louis and said to a newsboy, "Give me a paper." The newsboy refused and the messenger boy snatched one from the bundle and ran looking back over his shoulder and while doing so collided with the plaintiff knocking her to the pavement and injuring her.

The Supreme Court of Missouri might very well have exonerated the employer in that case because the messenger in stealing a newspaper and running away from the newsboy was certainly not engaged in the course of his employment but was on a "frolic of his own."

However, without resting its decision on this theory alone, the Supreme Court of Missouri went on to say that since the messenger boy was on a public street not by permission of the employer but in the exercise of a public right and since he was using his own legs and not a horse or automobile of the employer, there would be no liability on the employer's part for the messenger boy's negligence.

This case so far as we can ascertain has never been followed except in one case by the Missouri Court of Appeals, which being an inferior court, felt that it had no alternative but to follow the rule laid down. In doing this, however, the court stated:

"Whether the doctrine of the Phillips case is sound or unsound is not for this court; it is controlling, notwithstanding holdings in other jurisdictions to the contrary."

Ritchey vs. Western Union Telegraph Company,
41 S.W. (2d) 628.

In *Chiles vs. Metropolitan Life Insurance Company*, 91 S.W. (2d) 164, the Kansas City Court of Appeals states:

"The Phillips case, *supra*, has never been directly overruled. Still there is language in later decisions of the Supreme Court that we must accept as the last ruling case on the point involved that, at least by implication, overrules the Phillips case as applied to the fact as it appears in the case at bar."

In *17 St. Louis Law Review* 279, speaking of the Phillips case, it is said:

"The case is interesting in presenting the view that a master's vicarious liability under the rule of respondeat superior will not result from an act performed by the servant in a method or manner incident to his rights as a public citizen * * * To preclude the vicarious liability of the master because a servant makes use of the public right, to which use the master gives the original impetus, would unduly narrow the operation of the rule of respondeat superior."

In *27 Washington University Law Review* 122, in commenting on the Phillips case, it is stated:

"The reason announced for this decision by the court is difficult to justify. It has been pointed out by high authority and sustained, in effect, by the cases in other jurisdictions that scope of the employment is not dependent on time or place, but rather on the connection of the act with the employment."

In *Tighe vs. Ad Chong*, 112 Pac. (2d) 20, which was a sidewalk accident involving two pedestrians, the employer sought to invoke the protection of the Phil-

lips case. The California court, however, rejected this untenable theory and stated in part as follows:

“For several reasons the rationale of the Missouri cases (referring to the Phillips and the Ritchey cases) cannot be followed

“From the foregoing it will be seen that even in Missouri there appears to be some doubt as to the soundness of the decision in the Mrs. Phillips case, and besides it is conceded that the legal doctrine upon which it is founded is contrary to the one adhered to in other jurisdictions.”

In the Tighe case recovery was permitted against the employer whose employee negligently walked into another pedestrian on a sidewalk causing injury to such pedestrian. As to the employer's liability under such circumstances the court stated in part:

“Quite to the contrary, the law is well settled that in determining the question of respondeat superior the real test to be applied is whether at the time the employee commits the negligent act resulting in the injuries to the third person, he is engaged in performing some duty within the scope of his employment.”

The court should keep in mind that while probably overruled and certainly rejected in all other jurisdictions, the Phillips case applies only to an accident occurring on a public sidewalk where the employee according to said decision is exercising a public right.

The Supreme Court of Missouri in a very recent case where the negligent pedestrian was a messenger for Dun & Bradstreet and injured another person in

the entrance of a building owned by the Southwestern Bell Telephone Company, strictly confines the Phillips case to sidewalk accidents. While pointing out that the Phillips case is probably not good law, nevertheless it is not applicable in any event where the employee was not on a public sidewalk but upon private property, even though it is not the employer's premises. *Salmons vs. Dun & Bradstreet*, 162 S.W. (2d) 245.

By the same token, if this court should see any merit whatsoever in the holding of the Phillips case, that would not in any way affect the case at bar because the employee involved herein was not on a public sidewalk but was on private property, to-wit: a hotel lobby where she had gone under the direction of her employer and for no other purpose whatsoever. (Tr. 55)

Although not applicable here, the Phillips case is not good law even in sidewalk cases and the Supreme Court of Missouri itself in the Salmons case says that its research reveals "that the case stands alone, except for *Ritchey vs. Western Union Telegraph Co.*, supra, so far as concerns the notion that the fact that the messenger boy was on foot and on the sidewalk at the time of injury to plaintiff, would affect the application of the principle of respondeat superior."

In legal principle, the Phillips case cannot be reconciled with the following decisions:

Salmons vs. Dun & Bradstreet, 162 S.W. (2d) 245.

Tighe vs. Ad Chong, 112 Pac. (2d) 20.

Schediwy vs. McDermott (*supra*), 298 Pac. 107.

Price vs. Simon (*supra*), 49 Atl. 689.

Ryan vs. Keane (*supra*), 98 N.E. 590.

Mo., K. & T. Ry. Co. of Tex. vs. Edwards (*supra*), 67 S.W. 891.

EXCESSIVE SPECIAL DAMAGES

Western Union finally complains that Mr. Bromberg prayed for recovery of special damages in the sum of \$1413.70 in his complaint and was given judgment in the sum of \$1760.70 and that the difference in the two sums makes the amount awarded excessive.

It is not claimed that Mr. Bromberg did not prove special damages in the sum of \$1760.70, and it could not be so claimed because he did prove special damages in this amount without objection. (Tr. 32-35, 49-52)

The Federal Rules of Civil Procedure provide for just such a situation. Rule 15 (b) provides in part as follows:

“When issues not raised by the pleadings are tried by express or implied consent of the parties they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but

failure so to amend does not affect the result of the trial of these issues.”

Rule 54 (c) provides :

“A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.”

COMMENT

There are some statements contained in Western Union's Brief which are not accurate. Although probably unnecessary, we wish to call one or two of such statements to the Court's attention so that the Court will not be in any way misled.

For example it is stated on Page 8 :

“and she (Genevieve Cline) had walked on a distance of ten feet before she heard him cry out.”

Genevieve Cline did not testify to anything whatsoever which would justify such a statement. In fact, in examining the record, the Court will learn she did not testify at any time that she heard Mr. Bromberg cry out. Western Union has taken from the completely discredited testimony of the witness, James Lenhart, the absurd statement that Genevieve Cline was at least ten feet away from Mr. Bromberg when he fell down and from that conceived the inaccurate and erroneous statement above quoted.

In reading the record the Court will also learn why the testimony of the witness, James Lenhart, was discredited by the trial court. (Tr. 79-87, 111-116 inc.)

Western Union states in its Brief:

“that Genevieve came in contact with Mr. Bromberg in the very act of turning away from the desk”

and again

“but thought she brushed Mr. Bromberg before she had completely turned around”

We quote from the record:

“Q. And where was Mr. Bromberg at that time when you turned around?

A. Well, Mr. Bromberg was behind me and slightly to the side.

Q. About how far from you?

A. Well, I don't know exactly.

Q. Well, just your best judgment?

A. Oh, about two or three steps.

Q. Two or three steps?

A. Something like that.

Q. And then did you start moving away from your position at the desk?

THE COURT: I will tell you the best way to do that would be to show me. Mr. Joy, you come and stand behind her. You come down here and face like you were facing the desk. You just take any position there, a little further up. About how far behind (35) you? Where should he be?

A. He was a little closer than that, I would say. (Mr. Joy changes his position.) Mostly like that, yes.

THE COURT: About that way behind you, or a little more to your side?

A. Just about like that, yes.

THE COURT: All right. Thank you.

MR. MAUTZ: Q. And then when you moved away from the desk did you start running?

A. No, I didn't.

Q. You started walking? A. Yes.

. (Tr. 56, 57)

Q. Was there anybody else in the vicinity?

A. No.

Q. There wasn't anybody else there, was there?

A. No, sir.

Q. And it is quite a large area there in the lobby?

A. Yes.

Q. In other words, there was plenty of room for you to have walked without having any contact with Mr. Bromberg, wasn't there?

A. Yes, there was.

Q. But then in walking away from the desk you did have a contact with him?

A. Yes, I did.

Q. And as a result of that contact he went to the floor, didn't he? A. Yes." (Tr. 58)

This testimony and the actual demonstration given by Genevieve Cline clearly showed that she walked into Mr. Bromberg and not that she "brushed" against him in the act of turning from the desk. We have already quoted the finding on this point by the trial court. (Tr. 14)

Finally, counsel seems to get some comfort from the fact that Mr. Bromberg's memory was so confused as a result of this accident that he was not able to tell a coherent story as to just how the accident happened. Suppose Mr. Bromberg had been killed as a result of this accident and could not have told any story? Would Western Union contend that

no case could be made out against it by other evidence such as the testimony of its own employee if Mr. Bromberg's lips were thus sealed by death?

Before this accident Mr. Bromberg's mental condition and his ability to remember and tell what was going on was good. He was very alert. (Tr. 29) After this unfortunate accident there was a very perceptible change in his mental attitude and his memory became vague and there was a marked difference in his mental condition. (Tr. 29, 30, 42, 44, 45)

We appreciated better than anyone else that Mr. Bromberg had failed so that he was unable to tell how the accident actually happened. That is why we called Genevieve Cline as a witness. We would have had to do the same if Mr. Bromberg had been killed. Since the evidence which we did introduce, however, made out a case against Western Union, the fact that Mr. Bromberg's testimony might have been "vague, indefinite, contradictory" as claimed by Western Union, does not defeat his recovery.

Martinelli vs. Poley, et al., 292 Pac. 451.

Primm vs. Market Street Railway Company,
132 Pac. (2d) 842.

CONCLUSION

It is respectfully submitted, and we feel further argument and discussion thereon would be redundant, that this appeal is manifestly without merit and that the judgment herein should be affirmed.

Respectfully submitted,

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ADDENDUM

Since sending Appellee's Brief to the printer we have read the interesting and highly pertinent case of *Hobba vs. Postal Telegraph-Cable Company*, 141 Pac. (2d) 648, decided September 27, 1943.

The facts are set forth in this decision as follows:

"The appellant had in its employ two messenger boys, Eugene Allison and Zene Whipple. At the time of the injury to respondent, both boys were dressed in uniforms supplied by appellant. About 4 o'clock in the afternoon of the day in question, Whipple returned from a trip he had made with another messenger, and he was standing on the public sidewalk in front of appellant's telegraph office on the east side of Howard Street, in the city of Spokane. At that time, Allison came out of the office, charged with the duty of going on foot on an errand which would

take him to the place of business of the Spokane Chronicle and from there to the store of the J. C. Penney Company, on Riverside avenue. The ordinary and usual route of travel by foot would be to go south from the telegraph office to Sprague avenue and either cross Howard at its intersection with Sprague, or continue south and cross Sprague, and thence west.

"When Allison came out of the telegraph office, he stopped in front of Whipple, and, in a friendly manner, struck him on the chest, and then ran south along the sidewalk towards Sprague. Whipple followed in pursuit. Meanwhile, respondent and a woman companion were traveling east and crossing Howard along the north side of Sprague, with the intention of taking passage on a bus at the northeast corner of the intersection of these streets. As respondent stepped from the street to the sidewalk, she was slightly in advance of her companion. The boys were then advancing, both running, and Whipple had seized Allison by either the shoulders or neck. Both of the boys, while in this position, negligently and violently collided with respondent, causing her to fall, from which she sustained severe injuries."

The telegraph company defended on virtually the same grounds as does Western Union herein, including the theory of the Phillips case.

In the lower court the jury returned a verdict for the defendant but the court granted the plaintiff's motion for a new trial. The defendant appealed and the issue on appeal was whether the evidence was sufficient to take the case to the jury as to the responsibility of the telegraph company. In holding that the case was for the jury the Supreme Court of Washing-

ton sitting en banc, after reviewing the theory of the Phillips case, unanimously held:

“In approaching the problem involved here and upon the factual situation outlined above, one may feel that a distinction can and should be made between a case where the employee uses some instrumentality in his work, such as an animal or a vehicle, which, if not properly managed or operated, will do injury to others, and one where the employee travels on foot. But in each kind of case the employer has some sort of work which he wants done. It is for his benefit. He either cannot or does not desire to do it himself. He employs someone to do it for him. The doing of the work necessitates travel from the employer's place of business to some other location. The employee, while actually doing the assigned work, does a negligent act which causes injury to another who is not in any way at fault.

“Thus far, we have no hesitancy in saying that the employer is liable in damages to the injured person. Now, is there any logical reason why the same result should not follow whether the negligent act consists in the manner of driving the animal or operating the vehicle or in the manner of self-locomotion? The result to the injured person is the same. If the employer chooses to have the work done by another, he must be held responsible to others for the negligent conduct of his employee while doing the work, or else he should do the work himself. We think that if we try to draw a distinction between the different methods of locomotion that might result in injury to others, we not only misapply the doctrine of respondeat superior, but also forsake it entirely.

“So, it appears to us that both the reasoning and the application of the principles of law governing the relationship of employer and employee as to third parties in the cases cited by respond-

ent are sound and should be adopted in this case. It was upon these principles that the case was tried and submitted to the jury by the lower court, and they should be followed in any new trial that may be had.

“The trial court was not in error in denying the motion for a directed verdict and in granting the motion for a new trial.”

Thus, we have a recent decision making the liability of the telegraph company a question of fact where its messenger boys negligently collide with a member of the public while they are pedestrians and even while they are skylarking on a public street, but apparently at the same time on their way to deliver a message.

How much stronger is the case at bar where there is no skylarking and where the messenger is clearly and admittedly in the course of her employment in a hotel lobby.

APPENDIX

RULES OF CIVIL PROCEDURE

Rule 15 (b) :

AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The Court may grant a continuance to enable the objecting party to meet such evidence.

Rule 52 (a) :

EFFECT. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside

unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.

Rule 54 (c) :

DEMAND FOR JUDGMENT. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

WESTERN UNION TELEGRAPH COMPANY,
a corporation,

Appellant,

vs.

I. BROMBERG,

Appellee,

REPLY BRIEF OF APPELLANT

Upon Appeal from the District Court of the United
States for the District of Oregon.

HON. CLAUDE MCCOLLOCH, *District Judge.*

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

WESTERN UNION TELEGRAPH COMPANY,
a corporation,

Appellant,

vs.

I. BROMBERG,

Appellee,

REPLY BRIEF OF APPELLANT

Upon Appeal from the District Court of the United
States for the District of Oregon.

HON. CLAUDE MCCOLLOCH, *District Judge.*

The basic issue in this case is whether the Findings of the trial court that the appellant's messenger, Genevieve, was negligent and that the appellee, Mr. Bromberg, was not contributorily negligent, are supported by the evidence.

The appellee apparently believes that because he made such allegations in his complaint and the trial

court made such Findings, this court cannot set aside those Findings, even though they lack the support not only of the "clear weight of the evidence" but of any evidence at all. It is true that the appellee in his brief repeatedly makes the statement that Genevieve abruptly turned and walked directly into the appellee, but the only support found in the record for such a statement is in the appellee's own complaint (Tr. 3) and in the trial court's Findings (Tr. 14) where the allegations of the complaint in that respect are copied.

We think the law is completely clear that the findings of a court, trying a law case without a jury, must be supported by the evidence, and, what is more, "by the clear weight of the evidence." And it is clear that where the evidence is uncontroverted, the appellate court will, upon review of the trial court's findings, draw its own conclusions therefrom. The authorities recognizing these principles will be referred to presently in our discussion of the appellee's contentions.

Mr. Bromberg's case rests wholly upon the uncontradicted testimony of his witness Genevieve. The testimony of Mr. Bromberg himself as to how the accident happened is discredited and disowned by his own attorney (Appellee's Brief, pages 28 and 29); the testimony of John Goss, another witness for Mr. Bromberg, merely confirmed testimony already given by Genevieve that she apologized to Mr. Bromberg; and the testimony of James Lenhart (a witness for Western Union whose testimony appellee apparently

considers discredited) completely negatives negligence on the part of Genevieve. These were the only witnesses testifying in respect to the accident itself.

The appellee seems to recognize that the Findings are not supported by the testimony, and attempts (Appellee's Brief, pages 13, 14, 15, 19, 27-28) to find the necessary support in the trial court's alleged view of the scene of the accident and in Genevieve's demonstration or illustration of her testimony, made at the request of the court. We shall presently discuss the effect of those two matters, but we wish to call immediate attention to the fact that it is not possible from the record to determine what Genevieve's demonstration indicated, and that the record does not show that the court actually viewed the premises.

THE EFFECT OF RULE 52, FEDERAL RULES OF CIVIL PROCEDURE

The appellee in his brief repeatedly refers to Rule 52(a) of the Federal Rules of Civil Procedure which provides in part that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." On page 4 of the appellee's brief it is suggested that under Rule 52(a) the Findings of the trial court are conclusive upon this court, and that there is nothing for this court to do but affirm the judgment appealed from. The cases cited (Appellee's Brief, pages 16 and 17)

in support of that interpretation of Rule 52(a) certainly do not sustain any such proposition. In *Occidental Life Insurance Company v. Thomas*, 107 F. (2d) 876, *Maryland Casualty Company v. Stark*, 109 F. (2d) 212, and *Gates v. General Casualty Company*, 120 F. (2d) 925, the facts were not in dispute. In *Wittmayer v. U. S.*, 118 F. (2d) 808, a suit by the Federal Government for condemnation of lands, the evidence was clearly in favor of the Government and the testimony for the defendant was conflicting. In *Cherry-Burrell Co. v. Thatcher*, 107 F. (2d) 65, there was ample evidence to sustain the findings of the trial court. In *Luzier's, Inc. v. Nee*, 106 F. (2d) 130, the appellate court found that there was no evidence in the record to support the appellant's contentions. Thus, all of the cases cited by the appellee were cases either where the facts were admitted or where there was clearly sufficient evidence to sustain the findings of the trial court.

There are many decisions discussing the effect of Rule 52(a). *Luzier's, Inc. v. Nee*, 106 F. (2d) 130, cited on Page 16 of the appellee's brief, was a decision of the Circuit Court of Appeals for the Eighth Circuit, decided November 2, 1939. The brief extract from that case quoted on Page 16 of appellee's brief should be read in connection with the fuller discussion of Rule 52(a) to be found in the later decision by the same court, rendered on January 2, 1941, in *Aetna Life Insurance Company v. Kepler*, (8th Cir.), 116 F. (2d) 1, at pages 4 and 5:

"Prior to the effective date (September 16, 1938) of the Rules of Civil Procedure, the findings of fact of a trial court, in an action at law tried without a jury, were as conclusive, upon review, as a verdict of a jury, and could not be set aside by the reviewing court if there was any substantial evidence to support them. A different rule prevailed in equity cases. The findings of fact of the trial court in such cases were presumptively correct, and, unless clearly against the weight of the evidence or induced by an erroneous view of the law, would not be disturbed by a reviewing court.

"Rule 52(a) of the Rules of Civil Procedure, 28 U.S.C.A. following Section 723c, provides: '* * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *.'

"The effect of Rule 52(a) was to establish a uniform standard for testing the validity of findings of fact in any case tried without a jury. The standard adopted was that which had always prevailed in equity.

"This Court, with respect to jury-waived cases, is no longer merely a court of error which considers only questions of law. It now acts as a court of review in all non-jury cases in accordance with the practice which formerly prevailed in equity appeals.

"The findings of fact of the court below to the extent that they are unsupported by substantial evidence, or are clearly against the weight of the evidence, or were induced by an erroneous view of the law, are not binding upon this Court." (Italics added.)

And, as stated in *Kuhn v. Princess Lida of Thurn*, (3rd Cir.), 119 F. (2d) 704, at page 706:

“The sufficiency of the evidence to sustain a trial court’s conclusion or finding of an ultimate fact remains appropriate matter for an appellate court’s consideration. *State Farm Mutual Automobile Insurance Co. v. Bonacci, et al.*, 8 Cir., 111 F. (2d) 412, 415.”

As stated in the *Aetna Life Insurance Co.* decision quoted from above, a trial court’s findings of fact must be supported not only by evidence but by *the clear weight of the evidence*. This was again clearly pointed out and applied by the Circuit Court of Appeals for the First Circuit in *Fleming v. Palmer*, 123 F. (2d) 749, 751, wherein the court stated:

“The district judge’s finding * * * must stand unless it is clearly erroneous, due regard being given to the opportunity of the trial court to judge the credibility of the witnesses. Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723c. *A finding of fact is clearly erroneous if it is against the clear weight of the evidence. It does not suffice that it be supported by evidence. Aetna Life Insurance Company v. Kepler*, 8 Cir., 1941, 116 F. (2d) 1; *State Farm Mutual Automobile Insurance Company v. Bonacci*, 8 Cir., 1940, 111 F. (2d) 412; *Manning v. Gagne*, 1 Cir., 1939, 108 F. (2d) 718; Federal Rules of Civil Procedure and The American Bar Institute Proceedings, page 316, et. seq., (Cleveland, 1938); Clark & Stone, Review of Findings of Fact, 4 University of Chicago Law Review 190 (1937). In determining whether the finding was correct, we shall examine documentary evidence which we are as competent to consider as the trial court, testimony on which there is no conflict, and for the most part only the testimony of Palmer and Soltero, so that the element of credibility will not be seriously involved * * *. The judgment

of the district court is reversed * * *." (Italics added.)

The Circuit Court of Appeals for the Fourth Circuit, in *United States v. Still*, 120 F. (2d) 876, 878, has also pointed out that under Rule 52(a) a finding of fact, though supported by evidence, will be set aside if it is against the weight of the evidence.

On pages 4, 19 and 20 of appellee's brief it is said that whether or not a person is guilty of negligence or contributory negligence is ordinarily a question of fact to be determined by the jury or judge trying the case. This is, of course, the law, but it does not dispense with the requirement that the party having the burden of proof on any issue shall prove his case.

Since the appellee's case must find its support in the uncontroverted testimony of appellee's witness Genevieve, or not at all, there is no conflict of testimony and no element of credibility involved, and the conclusions to be drawn from such a record are a matter for the appellate court upon review of the trial court's Findings. *G. E. Emp. Sec. Corp. v. Manning*, (3rd Cir.), 137 F. (2d) 637, 639; *Murray v. Noblesville Milling Co.*, (7th Cir.), 131 F. (2d) 470, 474; *Kuhn v. Princess Lida of Thurn*, (3rd Cir.), 119 F. (2d) 704, 706; *U. S. v. South Georgia Railway Co.*, (5th Cir.), 107 F. (2d) 3; *U. S. v. Mitchell*, (8th Cir.), 104 F. (2d) 343, 346; *Sabine Towing Co. v. Brennan*, (5th Cir.), 85 F. (2d) 478, 481.

GENEVIEVE NOT NEGLIGENT

Although appellee (Appellee's Brief, page 26) charges appellant's original brief with inaccuracies in its discussion of the evidence, we shall not here again review the evidence which we tried to carefully summarize in our original brief (pages 7-10, 19-22, 24-27), inasmuch as this court has available (Tr. 26-105) the comparatively brief but complete transcript of the evidence from which the accuracy of any statements contained in any of the briefs in respect to the evidence can be determined.

We must again point out, however, that there is no evidence whatever in the record that Genevieve made a sudden and abrupt turn from the hotel desk and walked directly into Mr. Bromberg, or that her actions and movements were other than those of a reasonably prudent person, although at least twice in the appellee's brief (pages 2 and 5) the statement is made that "Genevieve turned abruptly about and walked directly into Mr. Bromberg." The only basis for such a statement is the allegation to that effect in the appellee's own complaint (Tr. 3), and in the trial court's Findings (Tr. 14), neither of which documents is evidence of the facts.

Inasmuch as the appellant's case here does not require the giving of any credit whatever to the testimony of James Lenhart, which the appellee considers discredited (Appellee's Brief, page 27), we shall not here discuss the weight to which it is en-

titled, but wish to call attention to the fact that, in spite of the appellee's opinion of that testimony, he attempts in his brief to make use of it on at least two occasions (Appellee's Brief, pages 5 and 18.)

GENEVIEVE'S APOLOGY

The appellee (Appellee's Brief, page 6) seems to contend, or at least to intimate, that Genevieve's apology to Mr. Bromberg, while she and a bellboy were picking him up from the floor after the accident, was an admission of *negligence*. If it is an admission of anything, it is, of course, only an admission that it was she who collided with Mr. Bromberg, and there is no issue or dispute about that in this case. The appellee cannot torture this polite apology from a 17-year-old girl to an 87-year-old man into evidence of negligence.

MR. BROMBERG'S NEGLIGENCE

The undisputed evidence shows that, though Genevieve did not know of Mr. Bromberg's presence, *he was aware of her presenc*~~ee~~ *when he placed himself close behind her in the path she would normally take when turning from her position at the hotel desk which he was waiting for her to leave.*

That might not have been negligence had he been a vigorous man who could have withstood the brushing which he should have known would ensue, but it

certainly was negligence in a man of Mr. Bromberg's enfeebled condition.

As a man whose hearing was impaired, Mr. Bromberg was required "to exercise his sense of sight with redoubled vigilance." 38 American Jurisprudence 895. As a man who was old and feeble, and unsteady on his feet, he was not justified in taking a risk which would be nothing to a man more vigorous. Shearman and Redfield on Negligence, Sec. 107, Page 253.

It is significant that the appellee has made no attempt to answer points IV, V and VI, found on pages 14 to 17 of appellant's original brief.

THE TRIAL COURT'S ALLEGED VIEW OF THE SCENE OF THE ACCIDENT

The appellee seeks to remedy the deficiency in his evidence by reference at least twice in his brief (pages 14, 15) to a view by the trial judge of the premises where the accident occurred.

Actually, the record does not show that the trial judge viewed the scene of the accident, but only that he expressed an intention to do so (Tr. 26). But the point is that a view by a trier of fact is not evidence, and cannot take the place of evidence, nor supply evidence which is not otherwise in the record. This is pointed out in the very Oregon case cited on Page 15 of appellee's brief, *State v. Sing*, 114 Or. 267, 275,

229 Pac. 921, where the Oregon Supreme Court said:

"The purpose of the view, under our statute, is not to take or receive evidence, but only to enable the jury, with the aid of visible objects, better to comprehend the evidence adduced upon the trial and apply the testimony to the issues: (citing cases).

"* * * In *Molalla Electric Co. v. Wheeler*, 79 Or. 478 (154 Pac. 686), it was held by this court that where a tract of land in litigation was viewed by court or jury, a judgment must be rendered, not on the view had, but on the evidence introduced as explained by the view."

The same rule applies, of course, whether the view be by a jury or by a judge. *Atlantic Coast Line Railway Co. v. Hendry*, 112 Fla. 391, 393, 150 So. 598; *Zambakian v. Leson*, 79 Colo. 350, 354, 246 Pac. 268.

In a negligence action where the jurors view the premises, their findings must be based on the evidence in the case, and not upon facts disclosed by the view and not otherwise in evidence, the view being permitted simply for the purpose of enabling the jurors to understand the evidence introduced, and not for the purpose of furnishing original evidence upon which to base a verdict. *Haswell v. Reuter*, 171 Wis. 228, 233, 177 N.W. 8.

A trial judge's view of a winding stairway, on which the plaintiff fell, could not supply evidence of the peculiar construction making the stairway a trap or pitfall. *Rietzel v. Cary*, 66 R.I. 418, 424, 67 R.I. 101, 19 A. (2d) 760, 21 A. (2d) 5.

GENEVIEVE'S ILLUSTRATION IN THE COURTROOM

The appellee is likewise driven to the expedient of attempting to supply the deficiency in his evidence by referring (Appellee's Brief, pages 13, 15, 17, 27-28) to Genevieve's demonstration in the courtroom, (Tr. 56-57, 63-64).

Genevieve's illustration of her testimony, made at the request of the trial judge, does not support the court's Findings. *Actually, there is nothing whatever in the record to show what occurred during Genevieve's enactment in the courtroom*, a condition of the record for which the appellee must take the responsibility. Genevieve was the appellee's witness (Tr. 54), and if he wished the record to show what occurred in the course of Genevieve's demonstration, it was incumbent upon him to place that information in the record by means of questions and answers or statements. That was done, for instance, in the case of *Arkansas River Packet Co. v. Hobbs*, 105 Tenn. 29, 31-32, 58 S.W. 278. The action there was for an injury to plaintiff's knee, and plaintiff, while a witness, exhibited and moved his knee before the jury. By questions, answers and statements the record was made to show what the demonstration revealed.

We think that the reason the record in our case was left in its present condition is that all concerned, the witness, the trial judge and counsel, understood that Genevieve's enactment was only an illustration, performed at the request of the trial

judge, of her testimony, during which she described the accident in great detail, and the demonstration proved to be in complete accord with her testimony of normal and reasonable and non-negligent conduct on her part. If there are to be any presumptions as to what the illustration by Genevieve revealed, the conclusion must be that it was not in any way in conflict with her testimony, for it must be expected that if there *had* been any conflicts, the able and experienced counsel for Mr. Bromberg, if not the trial judge, would have called immediate attention to the discrepancies.

If an illustration by a witness in the courtroom, where there is nothing whatever in the record to show the appellate court what the illustration revealed, can be held to supply necessary evidence not otherwise in the record, simply because the trial court made findings which could be supported only by the missing evidence, then no findings could ever be set aside, and no judgment could ever be reversed, for an absence of supporting evidence, so long as the record simply showed that a witness illustrated his testimony respecting the accident. It is common practice in personal injury cases involving automobiles to have a witness illustrate by the use of miniature automobiles. If the appellee's contention is correct, under those circumstances no verdict or finding could ever be set aside for lack of supporting evidence if the record merely indicated that the witness enacted an illustration.

This demonstration by Genevieve does not furnish evidence such as that in the case of *Philadelphia & R. R. Co. v. Berg*, 274 F. 534, cited and quoted from on pages 13-14 of appellee's brief. That case is not in the slightest degree in point on the question before this court. That was an action for injuries received by a seaman when a hook broke. The plaintiff claimed that an eyebolt was so badly bent that the hook could not properly enter it and therefore broke when subjected to a strain. The defendant contended that there was no evidence from which the jury could have drawn the conclusion that the condition of the eyebolt caused the hook to break. In addition to testimony as to how the accident happened and how the hook was fastened in the eyebolt, *the hook itself was put in evidence*, and, of course, the appellate court held (page 537) that the jury could draw its conclusions from the "real evidence", the hook, as well as from the oral evidence. Of course the jury had the right to take into consideration the hook itself, which was put in evidence and was in the record, as well as to consider what witnesses orally testified about the hook. Certainly the appellee in this case can gain no assistance or comfort from the holding in the *Berg* case.

We do not claim that it was *improper* for the trial court or counsel to have Genevieve demonstrate what occurred at the time of the accident (provided, of course, the re-enactment was performed under such circumstances as to fairly illustrate what occurred),

but that *what the trial judge might have seen, which is not in the record by description or otherwise for this court to see, cannot be considered evidence to take the place of necessary proof not otherwise in the record.*

The appellee would wish this court to infer that Genevieve's demonstration was in conflict with her testimony because the trial judge found that Genevieve was negligent and that the appellee was not negligent. Such an inference is not justified for two reasons. First, the trial court's findings could have well resulted from an erroneous interpretation of the law of negligence and contributory negligence (Appellant's Original Brief, pages 10-16); and second, if any inference as to what the illustration revealed is to be indulged in, we think, as we have already said, that the assumption must be that the demonstration was not at variance with Genevieve's oral testimony. If it had been, either the trial judge or the appellee's counsel, who tried the case so vigorously, would have quickly called attention to any such variance at some time during or subsequent to Genevieve's two demonstrations (Tr. pages 56-57, 63-64).

MR. BROMBERG'S TESTIMONY

Appellee's brief (pages 28-29) takes the appellant to task for pointing out to the court that Mr. Bromberg's testimony furnished no support whatever for the trial court's findings, although it was admitted

by Mr. Bromberg's counsel at the trial (Tr. 54) and in the appellee's brief (page 29) that Mr. Bromberg's version of the accident was not to be accepted. The appellee (Appellee's Brief, page 29) goes on to cite two cases to the effect that a plaintiff in a personal injury case may recover if he produces sufficient testimony from other witnesses even though his own testimony is too weak to support recovery. Of course that is the law, but our point is that the trial court's Findings are not supported by the testimony of any of the witnesses.

THE RULE IN THE PHILLIPS CASE

The appellant in its original brief (pages 17, 28-30) called attention to the line of authorities holding that an employer is not liable for the "negligent pedestrianism" of his employee. The appellee (Appellee's Brief, pages 20-25, 30-33) casts reflection on that principle by stating that the leading case, *Phillips v. Western Union Telegraph Company*, 270 Mo. 676, 195 S.W. 711, has "no pride of ancestry and no hope of posterity", and by citing a number of cases in which recovery has been allowed against an employer for the negligent action of his employee while on foot. While it is not in any way necessary for this court to approve the doctrine of the *Phillips case* in order to set aside the trial court's findings as being unsupported by the evidence, we should point out that in all the cases cited by the appellee on the subject (Appellee's

Brief, pages 6-9, 20-25, 30-33) there is an element of hurrying, running, frolicking or wrestling.

In *Tighe v. Ad Chong*, 112 Pac. (2d) 20, (cited on pages 9, 22 and 25 of Appellee's Brief), the defendant's delivery boy suddenly emerged backwards through a doorway, whirled around quickly and collided with plaintiff. In *Salmons v. Dun and Bradstreet*, 162 S.W. (2d) 245, (cited on pages 24 and 25 of Appellee's Brief), the defendant's messenger boy negligently pushed a revolving door with such speed and force as to injure plaintiff. In *Schediwy v. McDermott*, 113 Cal. App. 218, 298 Pac. 107, (cited on pages 6 and 25 of Appellee's Brief), the defendant's delivery boy came out of his shop "at a good brisk pace, faster than a walk" and collided with plaintiff. In *Price v. Simon*, 62 N.J.L. 153, 40 A. 689, (cited on pages 7 and 25 of Appellee's Brief), the defendant's ice delivery man returning from a customer's house ran into and injured a child. In *Ryan v. Keane*, 211 Mass. 543, 98 N.E. 590, (cited on pages 7 and 25 of Appellee's Brief), defendant's stable man crossed defendant's stable yard in a hurry, called out "get out of my road" and pushed plaintiff aside. In *Missouri, K. & T. Railway v. Edwards*, 67 S.W. 891, (cited on pages 8 and 25 of Appellee's Brief), defendant's brakeman ran against plaintiff and knocked him under the train. In *Hobba v. Postal Telegraph-Cable Company*, 141 Pac. (2d) 648, (cited and quoted from at length in the Appendix to Appellee's Brief, pages 30-33), two of defendant's messenger boys, while

scuffling and running, on a public street, *ran* into plaintiff. *Chiles v. Metropolitan Life Insurance Company*, 91 S.W. (2d) 164, (cited on page 22 of Appellee's Brief), involved a collision between two automobiles.

So far as our research discloses, and presumably so far as the attorneys for the appellee have been able to find, not a single case has yet held that a plaintiff may recover from an employer for injuries sustained as a result of unintentional body contact with a *walking* employee. It will be recalled that in our case Genevieve, at the time of the accident, was not running, hurrying or frolicking in any way (Tr. 57, 65).

STANDARD OF CARE

In appellant's original brief (pages 11-13) it was stated that in order for an act to be negligent a reasonable man in the situation of the actor must be able to foresee that the act will cause some injury to another. In answer to that, the appellee (Appellee's Brief, pages 9-12) urges that it is not necessary for the actor to foresee the precise injury resulting from an act in order for the act to be negligent. To this, of course, we agree; but our point is that a reasonably prudent person in Genevieve's situation could not have foreseen that her conduct, as the undisputed evidence shows it to have been, would cause any injury to anybody.

In all of the cases cited on the point by the ap-

pellee (Appellee's Brief, pages 9-12) the courts found that a reasonably prudent person should have foreseen that some injury would result from the acts complained of. In the case of *Miami Quarry Co. v. Seaborg Packing Co.*, 103 Or. 362, 204 Pac. 492, for example, the Oregon Supreme Court specifically held that the defendant should have foreseen that a barge permitted to break loose from its moorings might be carried by the forces of nature (wind, waves and tide) and cause some damage.

CONCLUSION

There are no matters of credibility or disputed testimony involved in the question before this court. The evidence is here, and if the Findings are against the "weight of the evidence" they must be set aside and the judgment reversed. And, *a fortiori*, this is true if there is no substantial evidence, and, of course, if there is no evidence at all, to support the Findings.

The appellee's complaint asserted that Genevieve was negligent, and the trial court found negligence, but the evidence does not show negligence. Genevieve turned from the hotel desk in a normal and reasonable manner, and, in doing so, came in contact with Mr. Bromberg who had, entirely unknown to her, placed himself closely behind her and *directly in the path that she or any other reasonable person would take in turning from the desk*. She was not negligent

unless *as a matter of law* she was required, before turning from the desk, to look around and ascertain the presence of anyone who unknown to her might have placed himself closely behind her and directly in her path. The negligence in this case was not Genevieve's. It was Mr. Bromberg's.

Respectfully submitted,

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No. 10547-48

United States 14
Circuit Court of Appeals
For the Ninth Circuit.

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vs.

COMMISSIONER OF INTERNAL REVENUE,
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INA CLAIRE WALLACE,
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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petitions to Review Decisions of the Tax Court
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

WILLIAM R. WALLACE, JR., ESQ.

RICHARD P. NORTON, ESQ.

WILLIAM R. RAY, ESQ.

For Commissioner:

A. T. MURRAY, ESQ. [1*]

*Page numbering appearing at top of page of original certified Transcript of Record.

United States Board of Tax Appeals

Docket No. 110143

WILLIAM R. WALLACE, JR.,

Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION .

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IRA:90-D CRA (CT:TS:PDSF.ORM) dated December 17, 1941, and as a basis of his proceeding alleges as follows:

1. The Petitioner is an individual with his residence at 930 Chestnut Street, San Francisco, California. The return for the period here involved was filed with the Collector for the First District of California.

2. The Notice of Deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the Petitioner on December 17, 1941.

3. The taxes in controversy are income taxes for the calendar year 1939 and in the amount of \$558.41.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

[2]

a. The Commissioner erred in adjusting petitioner's net income as shown on his return, by adding

thereto the sum of \$2,315.16 as shown in the statement accompanying notice of deficiency, which statement is attached hereto and marked Exhibit "B."

b. The Commissioner erred in computing petitioner's corrected income tax liability in the sum of \$6,256.43 based upon a taxable income of \$40,702.50 as shown in Exhibit "B." Petitioner does not object to the Commissioner's decrease of income by \$152.37 for decreased trust income.

c. The Commissioner erred in computing a deficiency of income tax of \$558.41 as shown in Exhibit "B."

d. The Commissioner erred in holding and determining that taxpayer's wife may not keep her residence with taxpayer at a point where she is not engaged in business.

e. The Commissioner erred in determining that taxpayer may not take a deduction from gross income for household expenses of taxpayer's wife while she was away from residence of herself and taxpayer on business.

f. The Commissioner erred in disallowing deductions for expenses of taxpayer's wife while away from the place of residence on business.

g. The Commissioner erred in determining that expenses of taxpayer's wife while away from residence on business were personal living expenses and not ordinary and necessary business expenses. [3]

h. The Commissioner erred in determining that the residence of taxpayer's wife was Los Angeles from March 16th to about September 15th, 1939.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

a. Taxpayer has maintained his home, domicile, residence and place of business in San Francisco since about 1929. On March 16, 1939 taxpayer and Mrs. Ina Claire Wallace were married, and have remained so ever since. Prior to that date, Mrs. Wallace lived in New York City.

b. From about May 1, 1939 to about September 15, 1939, Mrs. Wallace was in Los Angeles engaged in carrying out a contract with Metro-Goldwyn-Mayer wherein she performed services as an actress. She has been for many years an actress by profession.

c. From and after her marriage with taxpayer, Mrs. Wallace maintained her home and residence in San Francisco with taxpayer. Several times during her stay in Los Angeles while performing services as an actress, she returned home to San Francisco for short periods. At all times since March 16, 1939 she intended to live in San Francisco indefinitely, did not intend to live in Los Angeles, and while there she intended to stay there only as long as necessary to complete her contract for professional services.

d. From March 16, 1939, until about September 15, 1939, Mrs. Wallace expended out of community funds the following sums [4] necessarily incurred in performance of her contract of employment:

Food	\$ 786.90
Milk	22.06
Entertainment, etc.	301.77

Chaffeur	202.41
Cook	429.83
Flowers, gardener	99.20
Liquors, etc.	145.61
Rent	2,475.00
Light	41.02
Water	56.91
Gas	37.26
Wood	12.36
<hr/>	
Total	\$4,630.33

f. The sum of \$2,315.16 disallowed by Commissioner as a business expense is one-half of said total disbursements allocable to taxpayer as expenditures from community funds. Said expenditures were not personal living expenses of taxpayer, but were necessary and ordinary business expenses of taxpayer and his wife, and were in addition to personal living expenses of taxpayer and his wife in maintaining their home and domicile in San Francisco during the same period.

Wherefore petitioner prays that this Board may hear the proceeding and may find and decide in favor of petitioner and against respondent that no income tax deficiency exists for the year 1939, and that petitioner be relieved from the aforesaid determination of deficiency by the Commissioner.

W. R. WALLACE, JR.,

in pro per

RICHARD P. NORTON,

Counsel for petitioner

310 Sansome Street,

San Francisco, California. [5]

State of California,

City and County of San Francisco—ss:

William R. Wallace, Jr., being first duly sworn,
says:

That he is the Petitioner herein; that he has read the foregoing Petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true except those stated to be upon information and belief, and that those he believes to be true.

WILLIAM R. WALLACE,
JR.

Subscribed and sworn to before me this 6th day
of March, 1942.

[Seal] AMY B. TOWNSEND,
Notary Public in and for the City and County of
San Francisco, State of California. [6]

EXHIBIT A

Form 1230

Office of

Internal Revenue Agent in Charge

San Francisco Division

IRA:90-1D

CRA

(CT:TS:PD

SF:ORM)

Treasury Department
Internal Revenue Service
74 New Montgomery Street
San Francisco, California

Dec. 17, 1941

Mr. William R. Wallace, Jr.,
c/o Williamson & Wallace,
310 Sansome Street,
San Francisco, California.

Sir:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1939 discloses a deficiency of \$558.41 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco, California for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return (s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

By F. M. HARLESS,

Internal Revenue Agent in
Charge.

Enclosures:

Statement

Ford of Waiver

RR [7]

EXHIBIT B

Statement

San Francisco

IRA :90-D

CRA

(CT:TS:PD

SF:ORM)

Mr. William R. Wallace, Jr.,
 c/o Williamson & Wallace
 310 Sansome Street
 San Francisco, California

Tax Liability for the Taxable Year Ended December 31,
 1939.

	Liability	Assessed	Deficiency
Income Tax	\$6,256.43	\$5,698.02	\$ 558.41

In making this determination of your income tax liability, careful consideration has been given to your protest of June 27, 1941 and to the statements made at the conferences held on July 25, October 17, October 27, and October 31, 1941.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return	\$ 38,539.71
Unallowable deductions and additional income:	
(a) Living expenses while away from home.....	2,315.16
Total	\$ 40,854.87
Nontaxable income and additional deductions:	
(b) Trust income decreased	152.37
Net income adjusted	\$ 40,702.50

[8]

Explanation of Adjustments

(a) It is held that the taxpayer, Mrs. Ina Claire Wallace, your wife may not keep her place of resi-

dence at a point where she is not engaged in business and take a deduction from gross income for her living expenses while away from her residence.

Since it has been held that your wife, Mrs. Ina Claire Wallace, may not keep her place of residence at a point where she is not engaged in business and take a deduction from gross income for her living expenses while away from her residence, the portion of such expenses claimed as a deduction in your return for the taxable year 1939 is disallowed.

(b) Your distributive share of trust income for 1939 is adjusted as follows:

John M. Wallace, et al, Fiduciary	
Salt Lake City, Utah	\$ 11,118.07
Wallace Company, Fiduciary,	
Salt Lake City, Utah	6,051.42
	<hr/>
Total as adjusted	\$ 17,169.49
Total reported by you	17,321.86
	<hr/>
Net decrease	\$ 152.37
	<hr/>

COMPUTATION OF TAX

Net income adjusted	\$ 40,702.50
Less: Personal exemption	2,125.00
	<hr/>
Balance (surtax net income)	\$ 38,577.50
Less: Earned income credit	
(10 percent of \$14,000.00)	1,400.00
	<hr/>
Net income subject to normal tax	\$ 37,177.50
Normal tax at 4 percent on \$37,177.50	\$ 1,487.10
Surtax on \$38,577.50 (Amount in excess of	
\$4,000.00)	4,778.60
	<hr/>
Total tax	6,265.70
Less: Income Tax paid at the source	9.27
	<hr/>
Correct income tax liability	\$ 6,256.43

Income tax assessed:

Original, account No. 203880—First California

District 5,698.02

Deficiency of income tax\$ 558.41

[Endorsed]: U.S.B.T.A. Filed Mar. 11, 1942. [9]

[Title of Board and Cause.]

Docket No. 110143

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenichel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Admits the allegations contained in paragraph 3 of the petition.
4. (a) to (h), inclusive. Denies that the determination of tax set forth in the notice of deficiency is based upon errors as alleged in paragraph 4 and subparagraphs (a) to (h), inclusive, thereunder, of the petition. [10]
5. (a) Admits that the taxpayer has maintained his home, domicile, residence and place of business in San Francisco since about 1929, and that on March

16, 1939, taxpayer and Mrs. Ina Claire Wallace were married and have remained so ever since; denies all other allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) (c) (d) (f) For lack of information and for other reasons, denies all allegations contained in subparagraphs (b), (c), (d) and (f) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

(Signed) J. P. WENCHEL,
Chief Counsel, ALM
Bureau of Internal Revenue.

Of Counsel:

ALVA C. BAIRD,
Division Counsel.

T. M. MATHER,
ARTHUR L. MURRAY,
Special Attorneys,

Bureau of Internal Revenue.

[Endorsed]: U.S.B.T.A. Filed April 28, 1942. [11]

United States Board of Tax Appeals

Docket No. 110144

INA CLAIRE WALLACE,

Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IRA:90-D CRA (CT:TS:PDSF:ORM) dated December 17, 1941, and as a basis of his proceeding alleges as follows:

1. The Petitioner is an individual with her residence at 930 Chestnut Street, San Francisco, California. The return for the period involved here was filed with the Collector for the First District of California.

2. The Notice of Deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the Petitioner on December 17, 1941.

3. The taxes in controversy are income taxes for the calendar year 1939 and in the amount of \$503.41.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

[12]

a. The Commissioner erred in adjusting petitioner's net income as shown on her return, by adding

thereto the sum of \$2,315.16 as shown in the statement accompanying Notice of Deficiency, which statement is attached hereto and marked Exhibit "B"

b. The Commissioner erred in computing petitioner's corrected income tax liability in the sum of \$3,438.79 based upon a taxable income of \$27,958.87 as shown in Exhibit "B". Petitioner does not object to the Commissioner's decrease of income by \$62.60 for decreased fiduciary income, nor to increase of \$150.00 for unallowable bad debt (tax on this increase has been paid).

c. The Commissioner erred in computing a deficiency of income tax of \$503.41 as shown in Exhibit "B".

d. The Commissioner erred in holding and determining that taxpayer may not keep her residence with taxpayer's husband at a point where she is not engaged in business.

e. The Commissioner erred in determining that taxpayer may not take a deduction from gross income for household expenses while she was away from residence of herself and her husband on business.

f. The Commissioner erred in disallowing deductions for expenses of taxpayer while she was away from the place of residence on business.

g. The Commissioner erred in determining that expenses of taxpayer while away from residence on business were personal living expenses and not ordinary and necessary business expenses.

h. The Commissioner erred in determining that the residence of taxpayer was Los Angeles from March 16 to September 15, 1939. [13]

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

a. Taxpayer's husband, William R. Wallace, Jr., has maintained his home, domicile, residence and place of business in San Francisco since about 1929. On March 16, 1939, taxpayer and Mr. Wallace were married, and have remained so ever since. Prior to that date taxpayer lived in New York City.

b. From about May 1, 1939 until about September 15, 1939 taxpayer was in Los Angeles engaged in carrying out a contract with Metro-Goldwyn-Mayer wherein she performed services as an actress. She is and has been for many years an actress by profession.

c. From and after her marriage with Mr. Wallace, taxpayer maintained her home and residence in San Francisco. Several times during her stay in Los Angeles while performing services as an actress she returned home to San Francisco for short periods. At all times since March 16, 1939, she intended to live in San Francisco indefinitely, did not intend to live in Los Angeles, and while there she intended to stay there only as long as necessary to complete her contract for professional services.

d. From March 16, 1939 until about September 15, 1939, taxpayer expended out of community funds the following sums necessarily incurred in performance of her contract of employment: [14]

Food	\$ 786.90
Milk	22.06
Chaffeur	202.41
Entertainment, etc.	301.77
Cook	429.83
Flowers, gardener	99.20
Liquors, etc.	145.61
Rent	2,475.00
Light	41.02
Water	56.91
Gas	37.26
Wood	12.36
<hr/>	
Total	\$4,630.33

e. The sum of \$2,315.16 disallowed by Commissioner as a business expense is one half of said total disbursements allocable to taxpayer as expenditures from community funds. Said expenditures were not personal living expenses of taxpayer but were necessary and ordinary business expenses of taxpayer and were in addition to personal living expenses of taxpayer and her husband in maintainig their home and domicile in San Francisco during the same period.

Wherefore petitioner prays that this Board may hear the proceeding and may find and decide in favor of petitioner and against respondent that no income tax deficiency exists for the year 1939, and that

petitioner be relieved from the aforesaid determination of deficiency by the Commission.

WILLIAM R. WALLACE, JR.

RICHARD P. NORTON,

Counsel for Petitioner

310 Sansome Street,

San Francisco, California.

[15]

State of California,

City and County of San Francisco—ss:

Ina Claire Wallace, being first duly sworn, deposes and says:

That she is the Petitioner herein; that she has read the foregoing Petition, or had the same read to her, and is familiar with the statements contained therein, and that the statements contained therein are true except those stated to be upon information and belief, and that those she believes to be true.

INA CLAIRE WALLACE

Subscribed and sworn to before me this 6th day of March, 1942.

(Seal) AMY B. TOWNSEND,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires October 29, 1942. [16]

EXHIBIT A

Treasury Department

Form 1230

Office of

Internal Revenue Agent in Charge

San Francisco Division

IRA :90-D

CRA

(CT:TS:PD

SF:ORM)

Internal Revenue Service

74 New Montgomery Street

San Francisco, California

Dec 17 1941

Mrs. Ina Claire Wallace,
c/o Williamson & Wallace,
310 Sansome Street,
San Francisco, California.

Madam:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1939 discloses a deficiency of \$503.41 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may

file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco, California for the attention of —Conference Section—. The signing and filing of this form will expedite the closing of your return (s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

By F. M. HARLESS,

Internal Revenue Agent in
Charge.

Enclosures:

Statement.

Form of Waiver [17]

EXHIBIT B

Statement

San Francisco

IRA :90-D

CRA

(CT:TS:PD

SF:ORM)

Mrs. Ina Claire Wallace,
c/o Williamson & Wallace
310 Sansome Street,
San Francisco, California

Tax Liability for the Taxable Year Ended December 31,
1939.

	Liability	Assessed	Deficiency
Income Tax	\$3,438.79	\$2,935.38	\$ 503.41

In making this determination of your income tax liability, careful consideration has been given to your protest of June 27, 1940 and to the statements made at the conferences held on July 25, October 17, October 27 and October 31, 1941.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return	\$ 25,557.30
Unallowable deductions and additional income:	
(a) Living expenses while away from home	\$2,315.17
(b) Bad debt	150.00
	<hr/>
Total	\$ 28,022.47
Nontaxable income and additional deductions:	
(c) Fiduciary income decreased	63.60
	<hr/>
Net income adjusted	\$ 27,958.87
	<hr/>

Explanation of Adjustments

(a) It is held that you may not keep your place of residence at a point where you are not engaged in business and take a deduction from gross income for your living expenses while away from your residence.

Since it has been held that you may not keep your place of residence at a point where you are not engaged in business and take a deduction from gross income for your living expenses while away from your residence, the portion of such expenses claimed as a deduction in your return for the taxable year 1939 has been disallowed.

(b) You state that in May, 1937 you loaned \$500.00 to Marguerite Fitzgerald on a note due June 10, 1937, and that after this note became due and demand for payment had been made it was finally settled by said Marguerite Fitzgerald giving you seven new notes for \$50.00 each, due periodically from December 1, 1937, to June 1, 1938. You state that none of these latter notes was paid that due to the disappearance of the debtor you claimed the full amount of \$500.00 as a bad debt loss in 1939.

Loss is disallowed for the amount claimed in excess of indebtedness represented by the last above mentioned seven \$50.00 notes held by you.

Amount claimed on your return	\$ 500.00
Loss allowable (face value of notes)	350.00
	<hr/>
Amount disallowed	\$ 150.00
	<hr/>

(c) This item represents a decrease in your distribution share of income from Trust No. BH-20,

Bank of America, N. T. & S. A., Beverly Hills, California. Computation of adjustment follows:

Distributive share reported in your return	\$ 1,090.62
Distributive share as reported by the trust	1,027.02
Net decrease	<u>\$ 63.60</u>

[19]

COMPUTATION OF TAX

Net income adjusted	\$ 27,958.87
Less:	
Personal exemption	\$ 625.00
Credit for dependent	400.00
	<u>1,025.00</u>
Balance (surtax net income)	\$ 26,933.87
Less:	
Earned income credit	
(10 percent of \$14,000.00)	1,400.00
	<u>1,400.00</u>
Net income subject to normal tax	\$ 25,533.87
Normal tax at 4 percent on	\$25,533.87
Surtax on	\$26,933.87
(Amount in excess of \$4,000.00)	2,417.44
	<u>2,417.44</u>
Correct income tax liability	\$ 3,438.79
Income tax assessed:	
Original, account No. 203881—	
First California District	\$2,915.78
Additional, account No. 519024—	
8-22-41 list	19.60
	<u>2,935.38</u>
Deficiency of income tax	<u>\$ 503.41</u>

[Endorsed]: U.S.B.T.A. Filed Mar. 11, 1942.

[20]

[Title of Board and Cause.]

Docekt No. 110144

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits that the petitioner is an individual and that her return for the period here involved was filed with the Collector for the First District of California; for lack of information denies all other allegations contained in paragraph 1.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. (a) to (h), inclusive. Deines that the determination of tax set forth in the notice of deficiency is based upon errors as alleged in paragraph 4 and subparagraphs (a) to (h), inclusive, thereunder, of the petition. [21]

5. (a) Admits that taxpayer's husband, William R. Wallace, Jr., has maintained his home, domicile, residence and place of business in San Francisco since 1929; that on March 16, 1939, taxpayer and Mr. Wallace were married and have remained so ever since; denies all other allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b)(c)(d)(e) For lack of information and for

other reasons denies all allegations contained in subparagraphs (b), (c), (d) and (e) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

(Signed) J. P. WENCHEL

ALM

Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

Alva C. Baird,
Division Counsel.
T. M. Mather,
Arthur L. Murray,
Special Attorneys,
Bureau of Internal Revenue.

ALM:emb 4-22-42

[Endorsed]: U.S.B.T.A. Filed April 28, 1942.

[22]

The Tax Court of the United States

Docket Nos. 110143, 110144.

WILLIAM R. WALLACE, JR.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

INA CLAIRE WALLACE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

William R. Wallace, Jr., Esq., and

William R. Ray, Esq.,

for the petitioners.

Arthur L. Murray, Esq.,

for the respondent.

MEMORANDUM OPINION

Smith, Judge: These proceedings, consolidated for hearing, involve income tax deficiencies for the year 1939 as follows:

Docket No.	Petitioner	Deficiency
110143	William R. Wallace Jr.	\$558.41
110144	Ina Claire Wallace	503.41

The question in issue in both proceedings is

whether the living expenses of petitioner Ina Claire Wallace, wife of petitioner William R. Wallace, Jr., for a portion of the year 1939 while she was engaged in making a motion picture at Hollywood, California, under contract with Loew's, Inc., are deductible in computing petitioners' taxable income.

Petitioners' returns for the year 1939 were filed with the collector of internal revenue for the first district of California.

Petitioner Ina Claire Wallace, known professionally by her maiden name of Ina Claire, is a well known stage and screen actress. She was married on March 16, 1939, to petitioner William R. Wallace, Jr., an attorney, who was then living at San Francisco, California, where he had been engaged in the practice of law since 1927.

At the time of her marriage Ina Claire Wallace was engaged in making a motion picture at Hollywood, California, under contract with Loew's, Inc. This contract was made in November, 1938. It provided for petitioner's services, in making a single picture, for 34 weeks over a 40-weeks period beginning in November, 1938, and ending in September, 1939, at a salary of \$2,000 per week. Under the contract petitioner was required to remain in the vicinity of Hollywood during the 40-weeks period so as to be available for duty at any and all times.

[23]

Before entering her employment under the contract of November, 1938, and since about 1932, Ina Claire Wallace, then Ina Claire, lived in Connecticut and New York City, devoting most of her work-

ing time to the legitimate stage. From about August, 1932, to April, 1936, she lived at her home in Connecticut. From that time until November, 1938, she lived at the Pierre Hotel in New York City. For a part of that time she reserved an apartment in New York City which she subleased to others and never occupied herself.

The petitioners were married in Salt Lake City, Utah. They spent their honeymoon at La Quinta, California, and then returned to the home of petitioner William R. Wallace, Jr., in San Francisco for a month or six weeks. They talked over the matter of their future residence at the time and agreed to make their permanent home in San Francisco. Petitioner Ina Claire Wallace returned to Hollywood to resume work at the studio about May 1, 1939.

After completion of her picture and the termination of her contract with Loew's, Inc., on September 15, 1939, Ina Claire Wallace returned to San Francisco. She did not give up her career as a professional actress, however, and with the assistance and advice of her husband has since reviewed a great many plays which various authors, producers, and others have submitted to her for approval. She accepted and appeared in one of such plays for two or three months in the summer of 1940. In the fall of that year she began rehearsals in New York City of another play which opened on the road in January, 1941, and later ran in New York City for

two or three months. After this play closed, which was about the middle of April, 1941, she returned again to San Francisco and has lived there, except for occasional trips elsewhere, up to the present time.

During her stay in Hollywood in 1939 she lived at the Beverly Wilshire Hotel for a few weeks and then rented a house for a period of three months. At the expiration of that period she rented another house which she occupied until September 15 when she returned to San Francisco. The rental and her other living costs during that period are the principal items in controversy in these proceedings.

Petitioners filed separate income tax returns for 1939 in which each reported one-half of their combined community income and claimed deductions of one-half of their combined community expenses. The expenses so claimed in each return included one-half of the living expenses of petitioner Ina Claire Wallace during the period of her employment in Hollywood, which amounted in total to \$4,630.33. It is agreed that these expenses consisted of the personal living expenses such as rent, food, etc.

The respondent has disallowed the deductions claimed in petitioners' returns as not being within the deductions allowed by section 23(a) (1) of the Internal Revenue Code. This section of the Code reads as follows:

Sec. 23. Deductions from Gross Income.

In computing net income there shall be allowed as deductions:

(a) Expenses.— [24]

(1) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

The cases relied upon by the respondent include *Mort L. Bixler*, 5 B.T.A. 1181; *Charles E. Duncan*, 17 B.T.A. 1088; *affd.*, 47 Fed. (2d) 1082; *George W. Lindsay*, 34 B.T.A. 840, and *Walter M. Priddy*, 43 B.T.A. 18. We held in *Walter M. Priddy*, *supra*, that the living expenses of the taxpayer for a portion of the taxable year when he was required to be away from his permanent home and his family were not deductible. In our opinion we said:

The dispute centers around the location of *Priddy's* "home" as that term is used in section 23 (a) of the Revenue Acts of 1934 and 1936. In *Mort L. Bixler*, 5 B.T.A. 1181, we said that a taxpayer's "home", as that term was used in the statute, was his "place of business, employment, or the post or station at which he is employed." We held that a taxpayer may not keep his place of residence at a

point where he is not engaged in carrying on a trade or business and take a deduction for his living expenses while away from such residence or deduct traveling expenses for trips between his place of business and such residence. That case has been consistently followed. *Charles E. Duncan*, 17 B.T.A. 1088; *affd.*, 47 Fed. (2d) 1082; *Jennie A. Peters*, 19 B.T.A. 901; and *George W. Lindsay*, 34 B.T.A. 840.

The facts here show that Priddy's "home", as that term is used in the applicable revenue acts, was at Tyler, Texas, which was his principal place of business and the place where his employment by the Sabine Royalty Corporation necessitated the maintenance of regular living quarters. He was not away from his "home" in the pursuit of a trade or business while he was in Tyler and he is not entitled to deduct the cost of meals and lodgings incurred and paid while he remained in that city. The same is true with respect to the expenses ascribed to the automobile trips made to Wichita Falls for the purpose of visiting his family over week ends.

In *William Lee Tracy*, 39 B.T.A. 578, we held that expenses of the taxpayer for meals and lodging while employed as an actor in making motion pictures in California were personal living expenses and therefore not deductible as traveling expenses under section 23 (a) of the Revenue Act of 1934.

[25]

We think that the present proceedings are controlled by those cases and other cases therein discussed.

We do not think that it can be said that petitioner Ina Claire Wallace was traveling in pursuit of a trade or business during the period when she was engaged in making the picture at Hollywood. The contract of her employment required her to be in the vicinity of Hollywood and subject to call at any time. She was free to make her home there for the duration of her employment, as we think she did.

Petitioners contend, and we think correctly, that after their marriage San Francisco was the domicile or legal residence of both petitioners. However, as we have pointed out in the cases cited above, section 23 (a) is not concerned with legal residence. It refers to the taxpayer's "home," which we have construed to mean the taxpayer's "place of business, employment, or the post or station at which he is employed." *Mort L. Bixler, supra*. There can be no doubt under the facts here presented that Hollywood was the place of business, employment, or the post or station at which Ina Claire Wallace was employed during the portion of 1939 when the living expenses in question were incurred.

We do not think that our question here is in any manner affected by the community property laws of the State of California as petitioners argue in their briefs. No question has been raised by the respondent with respect to the treatment of the earnings of either of the petitioners as community income, nor as to the petitioners' right to the deduction in computing such community income of any amounts properly allowable under the statute. The fact that

San Francisco was the legal residence of petitioners and likewise of the marital community has no bearing on our question.

On the facts shown we think that the respondent has properly disallowed the deduction of the amounts in controversy.

Decision will be entered for the respondent.

Entered: May 7, 1943. [26]

The Tax Court of the United States
Washington

Docket No. 110143

WILLIAM R. WALLACE, JR.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Opinion entered May 7, 1943, it is Ordered and Decided: That there is a deficiency in income tax for the calendar year 1939 in the amount of \$558.41.

Entered May 7 1943.

(Seal)(Signed) CHARLES P. SMITH

Judge. [27]

The Tax Court of the United States
Washington

Docket No. 110144

INA CLAIRE WALLACE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Opinion entered May 7, 1943, it is Ordered and Decided: That there is a deficiency in income tax for the calendar year 1939 in the amount of \$503.41.

Entered May 7 1943.

(Seal) (Signed) CHARLES P. SMITH

Judge. [28]

The Tax Court of the United States
Washington, D. C.

Docket No. 110143

WILLIAM R. WALLACE, JR.,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

PETITION FOR REVIEW

Appellant files this his petition for review by the United States Circuit Court of Appeals for the 9th Circuit of the decision of the above entitled court rendered May 7, 1943.

Appellant filed with the Collector of Internal Revenue in San Francisco, California, his income tax return for the calendar year 1939. Said Collector's office is within the 9th Circuit of the United States Circuit Court of Appeal.

This matter is a companion matter with the matter of Ina Claire Wallace vs. Commissioner of Internal Revenue Docket No. 110144 in which a petition for review is being filed this day. The controversy involves an assessment of a deficiency income tax for the calendar year 1939 in the amount of \$558.41. The question in issue in this proceeding and in the companion proceeding above referred to is whether the living expenses of Ina Claire Wallace wife of Appellant herein for a portion of the year 1939 while she was engaged in making a motion picture in Hollywood, California under con-

tract with Loew's Inc. are deductible in [29] computing Appellant's taxable income. In his return for the year 1939 Appellant took as a deduction one-half of said living expenses of his wife Ina Claire Wallace incurred in Hollywood after the date of the marriage of Appellant and said Ina Claire Wallace in 1939 and after said Appellant and said wife had established their residence and home in the city and county of San Francisco State of California. Appellee has not questioned the correctness of the amount deducted by Appellant in deductible at all, nor has Appellee questioned the right of Appellant to deduct one half of deductible living expenses under the laws of California relating to community property deductions and under the Provisions of the Internal Revenue Code relating to Income Tax. Appellee disallowed the deduction claimed in Appellant's return as not being within the deductions allowed by Section 23(a) (1) of the Internal Revenue Code. Appellant claims that his wife Ina Claire Wallace was traveling in pursuit of a trade or business during the period when she was engaged in making the picture at Hollywood. Appellee denies this and the Tax Court of the United States by its decision of May 7, 1943, sustains the denial of Appellee. Appellant contends that even though his wife Ina Claire Wallace sojourned in Hollywood during the period involved that fact did not preclude Appellant from claiming as a proper deduction one-half of her living expenses while in Hollywood since it is admitted by the Appellee that this Appellant did not make

his home in Hollywood, California but at all times lived and made his home in the city and county of San Francisco.

Respectfully submitted,
(Signed) WILLIAM R. RAY
Attorney for Appellant.

[Endorsed]: T.C.U.S. Filed Aug. 4, 1943. [30-31]

The Tax Court of the United States
Washington, D. C.

Docket No. 110144

INA CLAIRE WALLACE,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,
Appellee

PETITION FOR REVIEW

Appellant files this her petition for review by the United States Circuit Court of Appeals for the 9th Circuit of the decision of the above entitled court rendered May 7, 1943.

Appellant filed with the Collector of Internal Revenue in San Francisco, California, her income tax return for the calendar year 1939. Said Collector's office is within the 9th Circuit of the United States Circuit Court of Appeal.

This matter is a companion matter with the matter of William R. Wallace, Jr., vs. Commissioner of Internal Revenue Docket No. 110143 in which a

petition for review is being filed this day. The controversy involves an assessment of a deficiency in income for the calendar year 1939 in the amount of \$503.41. The question in issue in this proceeding and in the companion proceeding above referred to is whether the living expenses of the Appellant for a portion of the year 1939 while she was engaged in making a motion picture in Hollywood, California under contract with Loew's Inc. and after the date of her marriage to Wil- [32] liam R. Wallace Jr., a resident of and maintaining a home in San Francisco, California are deductible under Section 23(a) (1) in computing Appellants taxable income.

In her return for the year 1939 Appellant took as a deduction one-half of her living expenses incurred in Hollywood after the date of her marriage to William R. Wallace Jr., and after Appellant and said William R. Wallace Jr., had established a home in the City and County of San Francisco, (the other one-half of said expenses and one-half of the income were reported in the return of William R. Wallace Jr., and are the subject of controversy in the matter of William R. Wallace Jr., vs. Commissioner).

Appellee has not questioned the correctness of the amount deducted by Appellant, if deductible at all. Appellee disallowed the deduction claimed in return as not being within the deductions allowed by Section 23 (a) (1) of Internal Revenue Code. Appellant claims that while in Hollywood and during the period involved she was traveling in pursuit of a trade or business. Appellee denies this and the

Tax Court of the United States by its decision rendered May 7, 1943, sustains the denial of Appellee.

Respectfully submitted,

(Signed) WILLIAM R. WALLACE JR.,
Attorney for Appellant.

[Endorsed]: T.C.U.S. Filed Aug. 4, 1943.

[33-34]

The Tax Court of the United States

Docket No. 110143

In the Matter of:

WILLIAM R. WALLACE, JR.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 110144

In the Matter of:

INA CLAIRE WALLACE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPORTER'S MINUTES

Hearing at Federal Court Room No. 401, Civic

Auditorium, San Francisco, California, on the 1st day of February, 1943, at 11:15 o'clock A.M.

The above-entitled proceedings came on for hearing on this 1st day of February, 1943, before the Honorable Charles P. Smith, Judge, the Tax Court of the United States, [37] San Francisco, California, pursuant to notice of hearing heretofore given, whereupon the following proceedings were had, to-wit:

APPEARANCES:

William R. Wallace, Jr. and W. R. Ray (310 Sansome Street, San Francisco, California) appearing on behalf of the Petitioners.

Arthur L. Murray, (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue,) appearing on behalf of the Commissioner of Internal Revenue, Respondent.) [38]

PROCEEDINGS

Judge Smith: We will take up Docket Nos. 110143, William R. Wallace, Jr., and 110144, Ina Claire Wallace.

Mr. Wallace: If your Honor please, in these matters I should first like to move the association of Mr. W. R. Ray as counsel in place of R. P. Norton, who is counsel of record. Mr. Norton has entered the Navy and I ask that Mr. Ray take his place.

Judge Smith: That request is granted.

OPENING STATEMENT OF WILLIAM R.
WALLACE, ATTORNEY FOR PETITIONERS

Mr. Wallace: In this matter, your Honor, we have taken the deposition of the petitioner Ina Claire Wallace and, except for some testimony that I will have to give as the other petitioner, there will be no other testimony.

This matter involved is deduction of expenses while the petitioner, Ina Claire Wallace, who is an actress, was engaged in the making of a motion picture in Los Angeles. There is no dispute as to the amount of any of the deductions. The sole question is as to the propriety of the deductions under the statute. The respondent's position is that they were personal expenses incurred while she had what might be called a business residence in Los Angeles. Our position is that they were expenses incurred while away from home while engaged in a business or profession. [39]

The case differs, your Honor, from the run-of-the-mill cases of this kind in this respect: It is, so far as I know, and I think Mr. Murray will agree so far as he knows, the first time that the question of the effect of the California Community Property Law on this question of deductions for expenses has arisen, and so that your Honor may see the significance of the testimony both in the deposition and the testimony that I will later give, I just point out the fact that under the community property statute of the State of California both spouses have a pres-

ent equal and existing interest in the community property and that the community property is under the control and management of the husband. In other words, the income of the wife as community income is part of the community property and is under the control and management of the husband. It is a point that we are raising here that, so far as I know, has not heretofore been raised in any of these deduction cases that I have been able to find.

I just want to make that much of a statement so that your Honor would appreciate that most of the testimony we have here given and practically the only denials in the government's answer to the petition are residence denials. The important question here is the question of residence.

I may also say in that connection that our California statute on residence is clear and specific. It [40] says (1) that you can only have one residence and that the residence of the wife is the residence of the husband.

I may just recite another factor, too, that is undisputed. I, one of the petitioners, am a lawyer who lives in San Francisco and have lived here many years and have maintained my residence and business here. The petitioner Ina Claire Wallace and I were married during the taxable year of March 16, 1939. That is the reason for testimony as to residence prior and residence after that date.

I think, Mr. Murray, with respect of the deposition of the petitioner Ina Claire Wallace the original has been filed.

Mr. Murray: May I say a word for the respondent before we get into that?

Mr. Wallace: All right, sir.

OPENING STATEMENT OF ARTHUR L.
MURRAY, ATTORNEY FOR RESPONDENT

Mr. Murray: It is respondent's position, if your Honor please, that Miss Claire had entered into a contract to spend a certain time, something near to a year, in Los Angeles before she became married to Mr. Wallace or before she had even intended to, and that she had come from New York to do so. It is the respondent's position that the Board has already held that a person may have a business [41] residence as distinguished from a home residence for the purpose of deducting business expenses. There are cases that the Board has decided, which I will cite in my brief, with respect to that. It is the respondent's position, further, that the marriage to Mr. Wallace didn't change that at all and that the facts will show that it didn't change that situation, and that, on the contrary, they will show that Mrs. Wallace's business residence from November, 1938 until some time in September, 1939, was Los Angeles and that her personal living expenses, which these are—rent, food, and so on, as has been stipulated in the deposition—were not deductible as business deductions either by herself or by her husband.

One thing to clarify the record a little bit. The returns will show that Mr. and Mrs. Wallace di-

vided these living expenses of Mrs. Wallace at Los Angeles just as they divided certain of her income for the period after their marriage, which was in March, 1939, until she left Los Angeles in September, 1939. That is why both petitioners are here, because they have divided what the respondent claims are personal living expenses of Mrs. Wallace from the time they were married until the end of her contract in Los Angeles, and they have each taken half of that total deduction. That's what brings both parties here.

Mr. Wallace: If your Honor please, in this matter [42] the deposition of the petitioner Ina Claire Wallace was taken on oral stipulation. Counsel for the petitioners and counsel for the respondent——

Mr. Murray: I am agreeing that the Court's rule against notice, and so forth, may be waived, if it please your Honor to do so, with respect to this and that the deposition be accepted subject to one objection that I made here, which I would like to ask your Honor to take under consideration and rule on. Then it is agreeable to both parties, if it is to your Honor, that the deposition may be accepted as it is.

Judge Smith: What is the objection?

Mr. Murray: On page 3 of the deposition counsel for the petitioner asked this question of Mrs. Wallace, and I am quoting: "After your marriage on March 16, 1939, will you state where you actually resided during the balance of that year?"

And I made the following objection there: "I

would like to object to this as calling for a conclusion of the witness."

Now, it is true that as she answered the question, I don't know that she ever answered that direct question, but I wanted to call your Honor's attention to the fact that that was calling for a conclusion of this issue that is before the Board and to the extent that she answered it [43] as such my objection goes.

Judge Smith: Well, wasn't that all cleared up on your cross examination as to what she meant by that?

Mr. Murray: I think it was, if your Honor please, but I wanted the record to show that I had registered the objection to the conclusion. It is my impression that your Honor will disregard the conclusion anyway, perhaps, but I wanted to be on record as calling your attention to it.

Mr. Wallace: I may say in that connection, your Honor, it was not my intent to in any way attempt to bind the respondent by a conclusion and in the next question I so framed the question. The particular question to which the objection was made was not answered. I then asked and put in these words "in other words, what cities or places you were in." I was attempting to fix here what we may call her geographical location during that period and I will stipulate that, so far as any conclusion of the witness is concerned as to the legal meaning of the residence——

Judge Smith: Well, that wouldn't bind the Board anyway. The objection is overruled.

Mr. Murray: O. K.

Judge Smith: Do you want to note an exception?

Mr. Murray: An exception, yes.

Judge Smith: An exception is noted.

Mr. Wallace: In connection with the deposition, [44] your Honor, there was introduced and it should have been made a part of the record of the deposition a photostatic copy of the written agreement between the petitioner Ina Claire Wallace and Loew's, Inc. I ask leave to file the exhibit with the court. It should have been attached to the deposition, but by reason of the fact that it took so long to get it photostated we agreed to bring it here this morning and let it be attached.

Mr. Murray: No objection. We read into the stipulation that we were withdrawing it to photostat it and then we would introduce it here. It may be introduced as an exhibit, if your Honor please.

Mr. Wallace: It should be marked as Petitioner's Exhibit A. It is so referred to in the deposition, and in order to create no confusion I think that——

Judge Smith: It would create less confusion if we simply receive it as Petitioner's Exhibit 1 at this time. It will be marked Petitioner's Exhibit 1 and received in evidence.

(Photostatic copy of contract referred to marked Petitioner's Exhibit No. 1 and received in evidence.)

PETITIONER'S EXHIBIT No. 1

New York, November 18th, 1938.

Miss Ina Claire,
New York, New York.

Dear Miss Claire:

Coincident with the execution of your contract with Loews, Inc. dated November 18th, and in modification thereof, it is understood as follows:

First: Re Paragraphs "1" and "3":

The date "November 22, 1938" contained in the above paragraph is to be changed to read "November 23, 1938".

Second: Re Paragraph "13":

Your obligation "to furnish all modern wardrobe and wearing apparel" shall be limited to include only such wardrobe and wearing apparel of which you may be possessed or may in the future acquire as part of your regular wardrobe and wearing apparel.

Third: Re Paragraph "17":

In lieu of the words "with a copy to Lyons & Lyons Agency, Hollywood, California" insert the words "with a copy to you, c/o Lyons & Lyons Agency, Hollywood, California, or such other address as you may designate to us in writing."

Fourth: Re Paragraph "18":

The following shall be added to the first sentence thereof:

"It is understood and agreed that the phrase "completion of services" as herein provided shall be construed as completion of your services in actual shooting only and shall not include services in connection with retakes and/or changes."

Petitioners Exhibit No. 1—(Continued)

Fifth: Re: Paragraph "23":

The word "hereinafter" contained on line 3 shall be changed to read "hereinabove".

Sixth: Paragraph "25" is to be eliminated in its entirety and in lieu thereof the following provision is to be inserted:

"During your stage year, the following is the procedure as to our right of recall: You are to notify us when you have obtained a role or if you are available for recall by reason of your having abandoned your intention of obtaining any role. In any event, if you do not so obtain a role within ninety (90) days from the time you leave our studios for such stage year, you shall be deemed available for recall. If you are available for recall either by reason of having abandoned your intention of obtaining a role or by reason of having failed to obtain a role within said ninety (90) day period, then we have the option thereafter in that stage year (October 1st to October 1st) to recall you (i.e. again to take your services) by giving you at least one week's prior written notice, which must be given not later than thirty (30) days after the date you are available, so to return to us, at a date set forth in said notice, which date in such notice
than

must not be later/sixty (60) days from the date you are so available, and you agree so to return to us and continue your services with us for the full remainder of such stageyear. If we do not exercise this option, it does not effect our right to

Petitioners Exhibit No. 1—(Continued)

go on with your services for the next picture year, for which we have exercised the option.

If within ninety (90) days as above provided, you so obtain a role in a stage play and so notify us, then you agree to give us as early notice as practical, of the date your services in this play will end, and such notice must be given to us in any event not later than two (2) days after you receive your notice advising you of the date of the closing of such play, and then we have the option during the remainder of such a stage year to recall your services at a date therein to be set by us in such notice, which date shall not be earlier than one (1) week after the date you have so informed us your services in the play will end, and not later than sixty (60) days after your giving us notice of your availability as aforesaid.

Anything herein to the contrary notwithstanding, it is understood that if the said play in which you may appear should close, and you shall have given notice of your availability, you shall have the right, within two (2) weeks from the date of the giving of said initial notice in which to give a second notice setting forth the name of the proposed second play in which you intend appearing and enclose with said second notice a copy of the proposed script of said second play. You shall then have the right to appear in said second play and should you appear in said second play, your obligation to give notice of the closing thereof, and our right to recall you upon the closing thereof shall be the same

Petitioners Exhibit No. 1—(Continued)

as hereinabove provided in connection with the first play. It is understood, however, that we shall have the right to recall you despite the giving of such second notice if we, in good faith, disapprove the script of such contemplated second play on the ground that your performance in such second play would be prejudicial to your stage and/or motion picture career, by written notice sent by us to you within one (1) week after receipt of your second notice and script as aforesaid, but it is understood that we may not disapprove said second script and recall you merely because we desire to have you render services to us.

If we do not exercise our right to recall you after the closing of your first play, it is understood that you shall be free to accept any other stage engagements throughout the remainder of such stage year and that we shall not be entitled to your services throughout the balance of such stage year.

Seventh: Re Paragraph "28".

The above paragraph is to be amended by deleting the period at the end of said paragraph and inserting the following: "Provided all 'shots' taken of you in said picture are eliminated before the release thereof."

Eighth: Re Paragraph "31".

After the word "years" on the tenth line thereof, add the words "for which you have been recalled."

Also, add the word "to" on the first line of this paragraph after the words "in addition".

Petitioners Exhibit No. 1—(Continued)

Except as hereinabove modified, the aforesaid agreement between us of even date shall remain in full force and effect.

If the foregoing meets with your understanding, kindly sign and return a copy of this letter and same shall constitute our binding agreement.

Very truly yours,

LOEW'S INCORPORATED

By (Signature illegible)

Vice-President

Accepted and Approved:

INA CLAIRE

New York, November 18, 1938.

Miss Ina Claire

New York City

Dear Miss Claire:

1. We now engage your exclusive services commencing upon your arrival at our studios in Culver City, California, which you agree will be November 22, 1938, and continuing until and including September 30, 1939. You assure us you have no obligations to others preventing you from entering into and fully carrying out the terms of this agreement.

2. The services generally which you agree to render us are acting, posing, dancing and singing, talking and rendering sound effects, vocal and instrumental, for recording and reproduction, as a motion picture actor for motion pictures of vari-

Petitioners Exhibit No. 1—(Continued)

ous types, as well as any other present or future kind of motion picture productions, including sound, silent, talking, musical and televised motion pictures, and such other services are now or may from time to time hereafter be performed by our other actors.

3. For these services and the rights herein granted we will pay you, and you agree to accept in full therefor, compensation at the rate of Two Thousand (\$2,000.00) Dollars per week for each week you shall actually have rendered services to us hereunder as, when and wherever required by us. Any compensation due you hereunder shall be payable on Saturday of each week for services rendered up to and including the Wednesday preceding. During the above term, we guarantee you compensation at the above rate for 40/52 of the above period (November 22, 1938, and to October 1, 1939 and may lay you off without pay for an aggregate of not exceeding the remaining weeks of the term; and similarly for each optional term (if any) hereunder granted us in paragraph "16" we so guarantee you your stated salary for a period of aggregate of periods of not less than forty weeks for each twelve months term for which an option is exercised hereunder, and may lay you off without pay for an aggregate of not exceeding the remaining weeks of each such term, and subject to each such minimum guarantee you shall be deemed to be laid off without pay when you are not actually appearing in a pic-

Petitioners Exhibit No. 1—(Continued)

ture or rendering any of your other required services under this contract. This guarantee is subject to your always being ready, willing and able to perform your services herein provided, and in the event of any suspension of this agreement or elimination of compensation as herein provided, we may reduce this guarantee by an equivalent period. During such layoffs you need not report at our studios.

4. You agree to comply with our reasonable studio regulations and render such services under our direction and in roles selected by us and to the best of your ability and wherever required by us, and you agree not to render any services to others, and not to write, act or appear for your own benefit in connection with any dramatic performances or entertainment during your employment with us or while we have options on your services which we may exercise, except you agree that we may lend your services to others in any capacity in which you are required to render services hereunder (and with the same incidental advertising and other rights in connection therewith as we have hereunder), and you agree to render same to the best of your ability. Any breach of this agreement by such others shall not be considered as to us a breach of or ground for termination of this agreement so long as we pay you your compensation named herein as it becomes due, which payments we always agree to make as herein provided, but nevertheless in the event of any breach by any other to

Petitioners Exhibit No. 1—(Continued)

whom your services are loaned by us, then as to the particular services which may be loaned, you shall be released from the obligations to render further services to such other person, firm or corporation.

5. If we request, you will also render your services to us hereunder in the recording, broadcasting and/or transmission of your likeness, voice and/or other sound effects by television, and/or by other electrical or mechanical means, your services of such nature to be rendered both in or in connection with the production or presentation of our motion pictures and the publicity thereof, whether or not the same be in connection with any kind of present or future motion pictures. You agree to render your services to us as an actor in television productions. In addition to the right to your exclusive services hereunder, we shall always own all rights of every kind and character, now or hereafter known, including copyright and its renewal and extension, in and to all products or results of any services of any kind or nature you render to us, and we shall likewise have the perpetual right to use your name, voice and likeness in connection therewith, as well as in connection with the advertising thereof. You also grant us the right and authority, to use and distribute and to authorize and license others to use and distribute your name, photographs and other reproductions of your likeness and of your voice, for any advertising or commercial purposes, including use in connection with the

Petitioners Exhibit No. 1—(Continued)

products and business of others unconnected with motion pictures, and regardless of whether or not any such authorized use constituted exploitation of yourself or of any of our photoplays; and it is agreed that the right and authority hereby granted by you shall be exclusively vested in us and in our licensees during the term of this agreement, including its optional periods, and for such term and periods you agree not to authorize or permit others to make any such use of your name, testimonials or photographs, and we may in your name restrain and/or prosecute others for any such use not so authorized by us; and it is further agreed that commencing upon the expiration of the term of this agreement, including its optional periods, and continuing thereafter during the distribution life of any photoplays in which you shall have appeared for us during said term and periods, we may use and authorize and license others to use such rights granted us but such use during such latter period shall be non-exclusive. You confirm in us full right to adapt, change, take from, add to, and use and treat in every way any and all products of your services to us. We may "double" or "dub" your roles and your acts, poses, plays and appearances, and/or your voice sound effects and recordings both in English and other languages.

6. You agree that your conduct during the term hereof will be such that it will not contravene public conventions or morals; and that during such period you will not commit any act tending to degrade

Petitioners Exhibit No. 1—(Continued)

you in society or bring you under public denouncement or into public contempt or ridicule or tending to shock or offend the community or prejudice us or the motion picture, theatrical or radio industry in general.

7. We agree that your name will appear on all positive prints of photoplays produced by us in which you appear. The foregoing shall not apply to "trailers" and in any event no inadvertent or casual failure on our part to comply with the provisions of the first sentence of this paragraph shall be deemed to be a breach of this agreement by us.

8. (a) If by reason of mental or physical disability, or for any other reason, you shall be incapacitated from the full performance of this agreement, or if your present facial or physical appearance or voice shall change, or become altered, materially detracting from your appearance on the screen or interfering with your present ability to perform the required services hereunder, thereupon this agreement shall be suspended, both as to services and compensation, during the period thereof, and at our election your current term of employment hereunder may be increased for a period equivalent to the period of such suspension, and if such disability or incapacity continues for an aggregate of over three (3) weeks during any term hereof, we may, at our option, cancel and terminate this agreement. Should we pay you any monies or compensation for or during any part of any suspension period, such may be deducted from any compensation earned

Petitioners Exhibit No. 1—(Continued)

after such suspension, and any overpayment of any kind will be returned by you upon demand, but this shall not be deemed to limit or exclude any other rights of credit or recovery we otherwise may have.

(b) In event of your failure, refusal or neglect to perform your services hereunder to the full limit of your ability and as instructed by us, or to observe any of your obligations under this agreement, we shall then have at our election, all, or any, or either of the following rights: to terminate this agreement; to eliminate all compensation for and during such period of non-performance, and also, if we elect, to extend your then current term of services for a period equivalent to the period during which such nonperformance shall have continued, and if at or during the time of such failure, refusal or neglect you have been cast in a photoplay or directed to render any other services hereunder, we may (whether or not we so extend your term) also eliminate all compensation to you and in addition may suspend this agreement during the period which reasonably would have been required to complete the portrayal of your said role or to render such other services, and if we elect, may also extend the provisions of this agreement for a like period of time. We shall also have the right, at our option, to extend the term of this agreement for a period of time equivalent to any leave or leaves of absence granted you during the term hereof.

Petitioners Exhibit No. 1—(Continued)

(c) In the event that at any time during the term hereof we or any person to whom your services are loaned by us should be materially interrupted or interfered with in the preparation, production or completion of photoplays by reason of fire, casualty, accident, riot, war, act of God, strike, lockout, labor conditions, executive or judicial order, enactment of any Municipal, State or Federal ordinance or law, or by any other cause of the same or any similar kind or character, or if by reason of the illness or incapacity of any principal member of the cast (other than yourself) or of the director of any photoplay in which you are rendering or are scheduled to render your services, the production of such photoplay is suspended, interrupted or postponed, or if the majority of the first run motion picture theatres in the United States shall be closed for a week or more, or in the event of any local or national emergency or condition adversely and materially affecting our industry or studios, then the obligations of each may be at our option suspended during the period of such interruption, interference, closing, emergency or condition (and the current term may also be extended by us for a period equivalent to all or any part of any period or periods during which any such event or events shall continue), but if such suspension should continue for a period or aggregate of periods in excess of 12 weeks during any term hereof, then and in that event either party may terminate this agree-

Petitioners Exhibit No. 1—(Continued)

ment by sending written notice to the other, except that we have a week after the receipt of your notice to us of desire to terminate, to resume payment of your salary from then on, thereby continuing this agreement in full force and effect.

(d) For the period of any suspension and/or elimination of compensation exercised by us, as above provided in (a), (b) or (c), your current term shall be deemed interrupted during such period (but during such period you may not render services to others) and resumed immediately thereafter. If your current term is extended under any provision of this agreement, in each such case dates for exercise of subsequent options and commencement of each subsequent optional term will be postponed accordingly, and if your current term is so extended, it shall continue in each such case after such resumption for a period equal to that portion of said term which was unexpired at the commencement of such suspension or elimination of compensation, unless subsequently extended or terminated for proper cause. In computing compensation to be paid or deducted with respect to any period of less than a week, the weekly rate shall be prorated at the rate of one-sixth of the weekly rate per day.

(e) All the foregoing rights are in addition to (and not in limitation of) any rights we may otherwise have under this agreement or otherwise and each are cumulative and none excludes or limits any right or priority allowed by law or equity.

Petitioners Exhibit No. 1—(Continued)

(f) No waiver by us of any breach of any covenant or provision of this agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same or any other covenant or provision.

9. Nothing herein contained shall be construed so as to require the commission of any act contrary to law, and wherever there is any conflict between any provision of this agreement and any material statute, law or ordinance contrary to which the parties have no legal right to contract, the latter shall prevail, but in such event the provision of this agreement affected shall be curtailed and limited only to the extent necessary to bring it within the legal requirements.

10. It is understood and agreed that the services to be rendered by you hereunder, and the rights and privileges hereunder granted to us by you, are of a special, unique, unusual, extraordinary and intellectual character which gives them a peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law, and that a breach by you of any of the provisions of this agreement will cause us irreparable injury and damage. Accordingly, you agree that we may have equitable and injunctive relief in the Courts to prevent any breach of this contract on your part, and in your name we may restrain any others from any use of your services, likeness or voice (or announcements to such effect), contrary to the provisions of this agreement. But this provision shall not be

Petitioners Exhibit No. 1—(Continued)
construed as a waiver of any other rights we may have in the premises for damages or otherwise.

(Sec. 11 eliminated.)

12. We shall have the right at any time and from time to time to have you examined by such physician or physicians as we may designate. Should we desire to obtain insurance of any kind on your life or in connection with your services to us, you agree we may do so for our benefit but at our own cost and expense, and you agree to submit to any medical examination then requested and to execute such applications and instruments therefor as reasonably may be required, but it is agreed that you shall have no rights or interest in or to such insurance or any proceeds thereof.

13. You agree to furnish all modern wardrobe and wearing apparel necessary for any and all roles to be portrayed by you hereunder; it being agreed, however, that in the event so-called "character" or "period" costumes are required, we shall supply the same, but in no event shall we be required to furnish shoes, hosiery, or underclothing, all of which shall be supplied by you for any and all roles to be portrayed by you hereunder. In each case all that is supplied by us remains our property.

14. Your services hereunder are to be rendered at such place or places as may from time to time be designated by us. When you are required to render your services on location (in any place other than Culver City or Los Angeles or their environs), we

Petitioners Exhibit No. 1—(Continued)

agree to furnish such necessary and reasonable meals and transportation as may reasonably be required for you during and on account of the rendition of such services, and where in our judgment it is necessary for you to remain on such location overnight, we agree to furnish your necessary lodging; but in no event, shall we be obligated to furnish you meals and lodging costing more than \$25. per day for both meals and lodging. In the event we should elect to produce a majority of our photoplays in any other place (either in California or elsewhere) other than Culver City or Los Angeles, then, at our option, the reference in this agreement to Culver City or Los Angeles shall be and be deemed to be a reference to such other place.

15. You agree that until the expiration of the term hereof, you will be available at all times at Los Angeles, California, or at any other place we may designate, unless excused in writing by us. You further agree that if and when requested by us to do so, you will report at our Studio, or at any other place we may designate, for wardrobe fittings, publicity interviews, publicity photograph sittings and for such discussions as we may deem necessary or desirable; it being understood, however, that no compensation whatsoever shall be or become payable to you for the compliance by you with such request by us.

16. In consideration of your present employment by us, you grant us the following separate options

Petitioners Exhibit No. 1—(Continued)

in the order named to extend the original term of your employment for the following consecutive terms (periods) of further employment below set forth, your employment for each further term where the option therefor is exercised, to be under the same terms and conditions as herein provided, except the rate of compensation per week for each respective term shall be as below designated:

(a) For Twelve (12) months at the rate of \$2500.00 dollars per week.

(b) For Twelve (12) months at the rate of \$3000.00 dollars per week.

(c) For Twelve (12) months at the rate of \$3500.00 dollars per week.

(d) For Twelve (12) months at the rate of \$4000.00 dollars per week.

Such options, or either or any of them, if we elect to exercise the same, must be exercised by us in the order named by written notice to you served as provided in "17" hereof at any time not later than thirty days before the expiration of the preceding term. We may exercise one or more or all of the options in the order named not already exercised, but the exercise by us of any one or more of said options shall not be construed as an election by us not to exercise the remaining options. All options granted us under this agreement for extending the term hereof, other than the options in paragraph "16" hereof specifically set forth, may be exercised by us by notice in writing to be served upon you at any time prior to the expiration of the term hereof.

Petitioners Exhibit No. 1—(Continued)

17. All notices to you hereunder may be served by service upon you personally, either in writing or unless otherwise specified herein orally, or by sending such to you by mail, cable and/or telegraph (date of mailing, telegraphing or cabling to be date of service) in care of our Culver City Studios or at our election to your address last given us, with a copy to Lyons & Lyons Agency, Hollywood, California.

18. If at the termination of your employment hereunder you are engaged on a particular picture or pictures or other assignment in which your services are not completed, we may nevertheless continue your employment under the same conditions, and at the rate of compensation existing immediately prior to said termination, for such time thereafter as we may desire your services in connection with such picture, pictures or assignment, but not exceeding sixty (60) days. As to retakes and changes not made prior to the expiration of your term or the extension above provided, you agree that you will upon our request (subject always to any prior engagements you then may have) return and make such retakes and changes (photography and/or sound) as we may desire, and we will pay you therefor your transportation both ways, and a rate of compensation while so engaged at our studios equal to the last rate of compensation you were receiving under this agreement, except that such compensation shall be paid only for the days on which you are actually so employed.

Petitioners Exhibit No. 1—(Continued)

19. You represent and warrant that you have not heretofore assigned all or any part of the compensation payable to you under this contract, and you agree that no assignment by you of all or any part of your compensation under this contract shall be binding upon us unless our written consent to such assignment is first had and obtained, and that you will hold us harmless from liability to others by reason of any purported assignment.

20. We may transfer or assign all or any part of our rights hereunder to any major producer or producer whose pictures receive distribution through a major distributor, and this agreement shall inure to the benefit of ourselves, our successors and assigns.

21. You agree to become a member in good standing of The Screen Actors' Guild, Inc., forthwith upon the execution hereof and to be and remain so for the duration of this agreement.

22. We agree to furnish you transportation and drawing room from New York City to Culver City for yourself and your maid, and if you go to Culver City alone, we agree to furnish your maid with transportation and lower berth at any later date you designate during the present term.

(See Rider)

By signing below under the word "accepted" you

Petitioners Exhibit No. 1—(Continued)

accept this employment and this becomes the final and complete agreement between us.

Yours very truly,

LOEW'S INCORPORATED

By[Signature Illegible.]....

Vice-President

Accepted:

INA CLAIRE, L. S.

State of New York

County of New York—ss.

On this 25th day of November, 1938 before me came[Illegible].... to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York, that he is a Vice-President of Loew's Incorporated, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation; and that he signed his name thereto by like order.

.....

[Signature illegible.]

State of

County of—ss.

On this day of before me came to me known, to be the individual described in, and who executed the foregoing instrument, and acknowledged that he executed same.

Petitioners Exhibit No. 1—(Continued)
Rider to contract dated November 18, 1938,
between Ina Claire and Loew's Incorporated

23. Anything to the contrary herein contained notwithstanding it is agreed that at the end of the present period of your services, and at the end of each optional twelve month period hereinafter provided for in paragraph "16" hereof where option is exercised, you may, at your election, under the terms and conditions hereinafter provided, call for and take an intervening period of one (1) year as a lay-off under suspension of this agreement to permit your appearance on the spoken stage and for your performances of such radio services as hereinafter permitted, each of which intervening periods shall be classed and is herein referred to, as a stage year. If such stage year is not so taken by you and therefore does not so intervene, then the procedure under this contract shall be as otherwise provided, that is, for illustration, your exclusive services to us for the present period ending October 1, 1939, shall be followed without break by your services for the first optional period (if we exercise our first option by September 1, 1939); and if you do not exercise your right to take the next stage year, i.e., a year after the first optional period, then the second optional year under "16" shall follow, if we exercise that option, and similarly for all later years. But, for illustration, if you elect to take a stage year after the present term, then the year from October 1, 1939 until October 1, 1940, shall be classed as a stage

Petitioners Exhibit No. 1—(Continued)

year, and your first optional year (if we exercise that option) shall then begin October 1, 1940 in place of October 1, 1939. Your failure to ask for any stage year, does not debar you from asking for the next stage year to which you may be entitled, for you have the right to insert an intervening year, as a stage year, after each picture, and we use the term picture year to mark and distinguish the present term (which is called a picture year though slightly less than full year), and the optional terms of one (1) year each under paragraph "16", from your intervening stage years.

But we may, under the conditions and contingencies herein provided, be entitled to secure your services during a stage year, and in that case such services are in addition to your services to us during the picture years.

To entitle you to any stage year, you must give us written notice requesting such, not later than the first day of August preceding the commencement of the stage year requested, that is, if you should wish to have October 1, 1939 to October 1, 1940 as a stage year, this notice must be given us by August 1, 1939.

It is particularly agreed however, that we always have the right before we release you for a stage year, fully to complete your services upon any motion picture as to which you are then working or cast (and this shall be classed as services in your picture year in which the picture was begun) except we cannot exercise this right of completion unless we

Petitioners Exhibit No. 1—(Continued)

have begun your services upon that particular picture by September 15th of that year. Subject to the foregoing, we must, after so receiving your notice that you are taking an intervening stage year, arrange to let you leave us at the beginning of your stage year, to wit, by October 1st. To illustrate, if you should notify us August 1, 1939 that you desire to have October 1, 1939 to October 1, 1940 as a stage year, then we must release you on October 1, 1939, except we could hold you over until we had completed your services on any pictures in which your services had begun prior to September 16, 1939. And we can so hold you over regardless of whether we have, or have not, exercised our next optional period (for the next picture year) under paragraph "16".

24. During your picture years (this term including your present term of services), you are to perform no services and make no appearances for any others, your services being exclusive to us during said period. During each of your stage years, you may not perform any services for others, or make any appearances, except as follows: appearances on the spoken stage, but only in the break-in run of a play, in the New York City run thereof, and in its road runs covering the "principal" cities of the United States, that is, those cities known in the theatrical profession as the cities in which first class road companies are accustomed to show, for you are not to appear on the stage in any play in cities other than cities of this class, except in break-in runs.

Petitioners Exhibit No. 1—(Continued)

You may also, in such stage years (except during the remainder of such a year after you are recalled and employed by us in picture work) give not to exceed six (6) individual broadcasts in each stage year, and by individual broadcasts is meant broadcasts where you are a guest performer and not a regular member of the program, and you may not appear more than twice as such guest performer on any one program in any stage year, provided, you are never to appear on any radio program which publicises any motion picture of any other motion picture company.

25. During your stage year, the following is the procedure as to our right of recall: You are to notify us when you obtain a role, and if you do not so obtain a role and so give us notice thereof that you are available to us within ninety (90) days from the time you leave our Studios for such stage year, then we have the option at any time thereafter in that stage year (October 1st to October 1st) to recall you (i.e. again to take your services) by giving you at least one weeks prior written notice which must be given not later than thirty (30) days after the date you are available, so to return to us, at a date set forth in such notice, which date must not be later than sixty (60) days from the date you are so available, and you agree so then to return to us and continue your services with us for the full remainder of such stage year. If we do not exercise this option, it does not effect our right to go on with your

Petitioners Exhibit No. 1—(Continued)
services for the next picture year, for which we have exercised option.

If within the ninety (90) day period above provided, you so obtain a role in a stage play and so notify us, then you agree to give us as early notice as practical, of the date your services in this play will end, and such notice must be given to us in any event not later than two (2) days after you receive your notice advising you of the date of closing of such play, and then we have the option during the remainder of such stage year, to recall your services at a date therein to be set by us in such notice, which date shall not be earlier than one week after the date you have so informed us your services in the play will end, and not later than sixty (60) days after our giving you said notice of recall.

26. Upon your return to us in a stage year by reason of our exercising either of the above options during such stage year (i.e. your failing to obtain a role within ninety (90) days, or by reason of the closing of a play in which you appear before the end of that stage year), then we have your services under the terms of this contract, for the remainder of your stage year, and these services shall be in addition to and not affect our rights to your services (if we exercise options) under the optional periods (picture years) for the full periods of twelve (12) months each and at the rate of compensation therein provided. Beginning with your return to us in such a stage year, we then must pay you for your services

Petitioners Exhibit No. 1—(Continued)

to us hereunder for the remainder of such stage year (provided, of course, that we have had your services for the full period of the preceding picture year, and there are no defaults on your part or inability to perform which would entitle us to your additional services at the prior rate of compensation, for in such cases we can use you at the former rate for a period corresponding to such default or disability) at the same rate as is provided for in your next picture year, and provided you keep your obligations and are ready, able and willing to so render your services to us, we then guarantee you compensation for the remainder of your stage year (at this rate) for 40/52 of the said remaining period of your said stage year. For illustration, should you render your services fully during the present term but take as a stage year, October 1, 1939 to October 1, 1940, and we (having a right so to do) recall you as of April 1, 1940, we must pay you at the rate of Twenty-five hundred (\$2500) Dollars per week, for your services rendered between April 1, 1940 and October 1, 1940, and we guarantee you for this six (6) months period a total twenty (20) weeks compensation, but could lay you off without pay for the remaining weeks, or use you for some or all of the remaining weeks for this same rate of compensation. In the illustration above, you then could not take as a stage year October 1, 1940 to October 1, 1941, for that would be reserved to us as your first optional period (picture year).

Petitioners Exhibit No. 1—(Continued)

27. You agree that you will not in any event enter into any commitments, or contracts for your services to others, for or during any stage years, which could prevent your return to us at the end of that stage year, (i.e. October 1st), as in every instance we have absolute right to your services for a full picture year immediately upon the conclusion of any stage year and you agree in any event and without notice to report at our studios ready, able and willing to perform your services on October 1st of each picture year as to which we have exercised our option.

28. It is understood and agreed that we may not use you hereunder in more than five (5) motion pictures during any year, October 1st to October 1st, (stage or picture year), a picture to count in the year in which your actual services therein begin, for by this we mean we are not to begin your actual services in more than five (5) pictures (foreign versions of a picture are included as part of the picture and shall not be deemed separate pictures) in any year (October 1st to October 1st), except that if we begin your actual services in a picture, and you are taken out within two (2) weeks after you so begin your services, said picture is not to count as one of the five (5) pictures in which you have rendered your services.

29. The following shall supplement printed "5" hereof: If we request, you will also render your services to us hereunder in the recording, broadcasting and/or transmission of your likeness, voice

Petitioners Exhibit No. 1—(Continued)

and/or other sound effects by radio, but it is agreed that you shall be required so to broadcast only once with respect to or on a program for the publicity of any photoplay in which you shall appear, and we may not compel you to broadcast otherwise for us, and each broadcast shall be from the place or vicinity where you shall be at the time. It is further agreed that nothing contained in said paragraph "5" hereof, shall prevent the use of your name and likeness by yourself or others in connection with stage productions or radio performances in which you appear in your stage years as permitted herein, or in connection with dress designing permitted under "36" hereof.

30. It is understood and agreed that during each stage year, if you elect to take same, this agreement is in every way extended and every period, term and provision pertaining to the time element is correspondingly postponed, and during each such stage year you are, of course, to receive no compensation from us, except if we recall and employ you as above provided.

31. In addition any other provisions of restriction herein, so long as your services are engaged under your options to us or otherwise hereunder, or we have options which we may still exercise, it is understood and agreed that you will not at any time, either for yourself or for others, perform any services of any kind in or in connection with motion pictures or television, for your said motion picture

Petitioners Exhibit No. 1—(Continued)
and television services are to be exclusive to us, and as to the present term and the periods under which you are actually engaged to us under the options, or for remainders of stage years, your employment and services are exclusive to us in every respect.

32. With respect to each of your picture years (including the present period) we agree that you will receive at least one lay-off of at least six (6) consecutive weeks, provided, however, that we may recall you during such or any lay-off period, for retakes and added scenes, and further provided, however, that if you have not had such a six weeks lay-off in a picture year, and there remains insufficient time at its end to lay you off for a period of at least six (6) consecutive weeks, we may in such case comply with the above by laying you off for the remaining unexpired balance of such term, even though such unexpired balance is less than six (6) weeks, but in such case, if you do not take a stage year and a picture year immediately follows, your lay-off is to continue into that next picture year sufficiently to give you your full six (6) weeks of lay-off.

33. In connection with printed paragraph "7", it is agreed that you are to receive first featured female billing on all positive prints of photoplays produced by us in which you appear. And you are to have similar billing on all printed advertising issued by us of photoplays in which you so appear if any other featured players are therein billed. You understand we may advertise or publicize a picture in which you appear, merely by name, or may mention

Petitioners Exhibit No. 1—(Continued)

only the name of the picture, or the name and the stars and/or director and may omit your billing on such advertising if we do not mention any other featured players. If at the commencement of your services hereunder you appear in the motion picture photoplay, now tentatively entitled "I Take This Woman", we agree in this particular instance only, to give you such featured billing on the positive prints and advertising issued by us of such photoplay which will be at least seventy-five percent (75%) in height of type of that of the type we use to bill on such prints our stars Spencer Tracy or Hedy LaMarr.

34. If this contract is suspended or we refuse (with legal right so to do) to pay you compensation pursuant to any right we may have under said contract or by law, by reason of your failure, refusal or neglect to perform the terms and conditions of this contract on your part to be performed, then we shall have the right, at our option, to extend the period of employment during which suspension and/or refusal to pay occurs for a period of time equivalent to the duration of the suspension and/or of the refusal to pay, which right may be exercised by us in notice in writing served upon you not later than one week after the expiration of such suspension or refusal to pay. Should we exercise the foregoing right of extension, then the running of the period of employment concerned shall be deemed to have been interrupted during the period of the suspension or refusal to pay because of which the extension is made

Petitioners Exhibit No. 1—(Continued)

and to have been resumed immediately upon the expiration of such suspension, or upon the resumption of payment of compensation, and to continue from and after the date of such resumption for a period equal to the unexpired portion of the term of period concerned at the time of the commencement of such suspension or refusal to pay, subject to subsequent extension or termination for proper cause. In the event of such suspension or extension by reason of your failure or refusal or neglect to perform the terms and conditions of the terms of this contract on your part to be performed, you now agree to waive the dates of the picture and stage years so that we may have the right to extend such for a period equal to such suspension and/or refusal to pay compensation, and similarly the dates for the exercise of any subsequent options and the dates for commencement of any period or periods of employment following the period extended shall be postponed accordingly. In the event of your failure, refusal or neglect to return to our Studios for your services herein after we have given you notice recalling you during any stage year, in addition to any other rights we may have hereunder, or in law or in equity, we shall have, at our election, either the right to terminate this agreement, or require you to perform your services for the next two (2) picture years consecutively, in which case, by reason of such default you agree to give up your next following right to take a stage year and in such case

Petitioners Exhibit No. 1—(Continued)

(without limiting any of the foregoing) dates of exercise of our options are postponed accordingly.

If any suspension is caused by any reason other than your wilful failure, or your refusal or your neglect, then such suspension shall not affect the (October 1-October 1) periods, except that if we are entitled to any extension of period by reason thereof, you agree to cut short your next following stage year, so that we may have your services before the end of such stage year for a period prior to the beginning of the next picture year, equal to such suspension or extension, and at the same rate of compensation as you received during the period during which such suspension occurred.

35. It is agreed that if on or after October 1, 1940, we deem it necessary or advisable that you execute a new agreement of employment with us on the same terms and conditions as herein provided, commencing as of date of such new contract and providing for the balance of the continuance (and options) of this contract, you now hereby agree to execute such new agreement. And in any event, you agree that your failure, neglect or refusal to execute such new agreement shall not affect our right to your services under this agreement for the full period and as and when required by us.

36. You may, notwithstanding anything herein contained, and at all times, continue to render your services as heretofore in the use of your name and likeness in connection with the designing of gowns, hats, gloves, bags, shoes and ensembles for the better class department and specialty stores throughout

Petitioners Exhibit No. 1—(Continued)
the United States, which are now featured in some of the Fifth Avenue shops as “Ina Claire Ensembles”, and any compensation or royalties you may receive therefrom is to be solely yours, provided, however, that you now agree that you will use your best efforts to see to it that hereafter your name in connection therewith shall be accompanied by appropriate mention of your employment with us or your being a featured player or star of Metro-Goldwyn-Mayer, and in connection therewith to co-operate with our Publicity Department, and in no event shall your name or likeness be used in connection with the product of any other motion picture company or any other motion pictures. We agree not to use your name or likeness in any connection with any product competitive with those named in the publicity of pictures in which you appear, without your prior written consent.

LOEW'S INCORPORATED

By[Signature Illegible.]....

Vice President

INA CLAIRE (L.S.)

(INA CLAIRE)

[Endorsed]: T.C.U.S. Filed Feb. 1, 1943.

Judge Smith: I understand that you are offering the entire deposition in evidence. That includes both the direct and cross examination? [45]

Mr. Wallace: That is correct, your Honor.

Judge Smith: The deposition is received in evidence.

[Printer's Note: Deposition of Ina Claire Wallace is set out at page 102 of this printed record.]

Mr. Wallace: May I be sworn?

Whereupon,

WILLIAM R. WALLACE, JR.

was called as a witness for and on behalf of the petitioners, and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ray:

Q. Please state your full name, please, Mr. Wallace.

A. William R. Wallace, Jr.

Q. And you are the petitioner in one of the matters now before this court? A. I am.

Q. Will you state, Mr. Wallace, how long you have lived in the State of California?

A. Since 1927.

Q. And during that period of time what has been your occupation?

A. I have been a lawyer in the City and County of San Francisco.

Q. During that period of time have you at all times [46] filed your income tax returns from the State of California as a resident of that State?

A. I have.

(Testimony of William R. Wallace, Jr.)

Q. During the year 1939 you were married, were you, Mr. Wallace? A. I was.

Q. Will you state the date, please?

A. March 16, 1939.

Q. And where were you married?

A. In Salt Lake City, Utah.

Q. When did you return to the City and County of San Francisco following your marriage, Mr. Wallace?

A. About the 1st of April.

Q. And following the 1st of April, 1939 where did you live in the City and County of San Francisco?

A. Well, for a period of about two weeks we lived at the Fairmont Hotel.

Mr. Murray: If your Honor please, I object to that as being non-responsive. I understand the question to be "Where did you live?" and he is saying where "we lived."

A. (continuing) I will amend the answer. I misunderstood the question. I lived at the Fairmont Hotel.

By Mr. Ray:

Q. Did Mrs. Wallace live at the Fairmont Hotel during that time, Mr. Wallace? [47]

A. She did, yes.

Q. And then following that period?

A. Then I had an apartment at the Cathedral Apartments, an apartment I had had for many years.

(Testimony of William R. Wallace, Jr.)

Q. And did Mrs. Wallace reside there for any time? A. She did.

Q. How much of the time that you lived there did she reside there?

A. She resided there until about the 1st of May.

Mr. Murray: If your Honor please——

By Mr. Ray:

Q. And after you left the Cathedral Apartments where did you live?

A. Well, I continued to live at the Cathedral Apartments until the 1st day of September, 1939, at which time I took a house at 1350 Jones Street in the City and County of San Francisco.

Q. And how long did you maintain that?

A. At that house for about a year and a half.

Q. So that during the entire taxable year 1939 you maintained living quarters in the City and County of San Francisco, is that correct?

A. That is correct.

Q. And will you state during what period of the time after your marriage on March 16, 1939, until the end of the [48] taxable year 1939 Mrs. Wallace was physically present in the City and County of San Francisco, if you can?

A. Well, we arrived here about the 1st of April. She was here throughout that month. She went back to Los Angeles about the 1st of May. She remained there until about the 1st of July. She was here most of the month of July and then returned to Los Angeles. She then returned here again about the 15th of September and remained here almost all the bal-

(Testimony of William R. Wallace, Jr.)

ance of the year. I think we left here and went east about the 15th of December, as I recall it.

Q. During that period of time you engaged in the practice of law in San Francisco?

A. That is correct.

Q. During that period of time, Mr. Wallace, 1939, did you have any connection with the work of Mrs. Wallace and her work as a movie actress?

A. Yes.

Q. Will you state what that was, please?

A. Well, during that period there were a number of questions arose in connection with her employment. The ones in which I had any part were the ones that had anything to do with the request on the part of Loew's, Inc. that she do three motion pictures; discussed whether or not she should do those pictures, and decided that she should not. I consulted with her or she with me and we talked and discussed [49] the matter with her motion picture agent, and so on. That is all that I had to do with the matter until after September. Then after the contract was over and Mrs. Wallace returned here there were a number of other offers to do other motion pictures, which we discussed and did not accept, and then there was another request from Loew's, Inc. to re-do a picture which had previously been made, and that also we discussed and finally decided not to do. Then after September 15th, which was the end of the motion picture business, a good many stage plays are read and discussed, talked to the various people who had sent them out,

(Testimony of William R. Wallace, Jr.)

who were then engaged in the business of trying to arrange for a play as distinguished from a motion picture for that theatrical season.

Q. At the time of your marriage in March, 1939, were you familiar with the contract that Mrs. Wallace had with Loew's, Inc?

A. Well, I was familiar with it in the sense that I had read it over and had discussed the matter with her agent.

Q. You are a lawyer, are you, Mr. Wallace?

A. That is correct.

Q. And have been practicing, I believe you stated, in California for a number of years?

A. That's right. [50]

Q. In your examination of that contract and in your opinion as to that contract as a lawyer, was Mrs. Wallace on March 16, 1939, bound by the terms of that contract to perform certain obligations for Loew's, Inc.?

Mr. Murray: I object to that, if your Honor please, as calling for a conclusion of the issue that the Court has to decide.

Judge Smith: The objection is sustained.

By Mr. Ray:

Q. You filed an income tax return for 1939, did you, Mr. Wallace?

A. I did, yes.

Q. And Mrs. Wallace filed a separate income tax return for that same year?

A. That's correct.

(Testimony of William R. Wallace, Jr.)

Q. In your income tax for that year what income did you include?

A. Well, I included my separate income and I included the one-half of the community income.

Q. And when you say "one-half of the community income" you are referring to the earnings of you and Mrs. Wallace during your marriage, each of you; is that correct?

A. That's right. Both of us. We took the community income as a total and the community expenses as a total, took the community expenses from the community income and [51] returned one-half of the balance on each return.

Q. In other words, you took into consideration in your return the 1939—

Mr. Murray: If your Honor please, I object to this leading so much. For one thing, the returns are available here in court and they will speak for what they contain. I object to the leading.

Judge Smith: I don't see that that is leading. The objection is overruled.

By Mr. Ray:

Q. When you prepared your return, Mr. Wallace, you intended to take one-half of the expenses which are now at issue before this court, is that correct?

A. I intended and did take them on my return.

Q. And in taking that deduction you examined those expenses, did you?

A. That's correct.

(Testimony of William R. Wallace, Jr.)

Q. And in taking the expenses you took them as necessary expenses from Mrs. Wallace?

Mr. Murray: I object to that as calling for the conclusion of the witness.

Mr. Ray: Well, if your Honor please, I may have framed the question improperly. I simply want to show by this witness that they were expenses that were necessary wherever her residence was, whether here or there, as a [52] part of her operations as a movie actress, in his opinion.

Judge Smith: Well, I think the objection is well taken. I will sustain that one.

By Mr. Ray:

Q. Following September, 1939, which I believe you stated was the termination of Mrs. Wallace's contract, did she have any other theatrical or movie commitments during that year?

A. None, no.

Mr. Ray: I believe that's all.

Judge Smith: Cross examination.

Cross Examination

By Mr. Murray:

Q. Mr. Wallace, the expenses that we are speaking of here, the nature of which has been stipulated, of course, those were the expenses of Mrs. Wallace at Beverly Hills or Hollywood or both, wherever she was during the period from your marriage until the termination of the contract only; is that right?

A. Well, there were no expenses after September 15th. I take it that is the point.

(Testimony of William R. Wallace, Jr.)

Q. No, no. I was really getting at what expenses she may have had before that time.

A. I am sorry, Mr. Murray. I didn't understand.

Q. The deduction here in question, which has in effect [53] been divided by Mrs. Wallace and yourself on the returns, has been for her living expenses in southern California for the period from March 16th, the date of your marriage, until the time she returned from there in September?

A. That is right. I think that is right, Mr. Murray. I think a mistake was made in not taking the expenses prior to March 16.

Q. Yes. No expenses were taken from January 1 to March 15th?

A. No expenses were taken from January 1 to March 15th. I think that was a mistake.

Mr. Murray: I think that is all.

Judge Smith: Any redirect examination?

Mr. Ray: No.

(Witness excused).

Mr. Murray: If your Honor please, I offer as respondent's Exhibit A the Federal Income Tax return of William R. Wallace, Jr. for the year 1939; the original return.

Judge Smith: That will be marked Respondent's Exhibit A and received in evidence.

(Federal Income Tax Return for year 1939 marked Respondent's Exhibit A and received in evidence.)

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FORM 1040-10
 Single Individual
 Individual Income Tax

UNITED STATES INDIVIDUAL INCOME TAX RETURN 1939

FOR NET INCOMES OF MORE THAN \$5,000 FROM SALARIES, WAGES,
 DIVIDENDS, INTEREST, ANNUITIES, AND FOR INCOMES FROM
 OTHER SOURCES REGARDLESS OF AMOUNTS

For Calendar Year 1939

or fiscal year beginning Jan. 1, 1939, and ended Jan. 1, 1940

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the third month following the close of your taxable year

PRINT NAME AND ADDRESS PLAINLY. (See Instructions C)

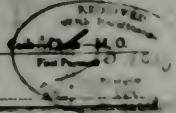
WILLIAM B. WALLACE, JR.

Williamson & Wallace, 310 Sansome Street,

San Francisco, California

(Do not write these spaces)
 No. 2999
 Date 203880

142451



INCOME			
1. Salaries and other compensation for personal services. (From Schedule A)		\$21,937	00
2. Dividends		146	50
3. Interest on bank deposits, notes, mortgages, etc.			
4. Interest on corporation bonds			
5. Taxable interest on Government obligations, etc. (From Schedule B)			
6. Income (or loss) from partnerships, grafts, etc., pools, etc. (other than capital gains or losses). (From Schedule C)			
7. The Conn. Co. o Walker Bank & Trust Co., Salt Lake			
8. Income from Schedule D. (From Schedule D)		17,321	46
9. Rents and royalties. (From Schedule E)			
10. Income (or loss) from business or profession. (From Schedule F)			
11. Other income (including income from annuities) (From Schedule G)			
12. Total income in items 1 to 11. (Other taxable income in Schedule H)		\$39,406	04
DEDUCTIONS			
13. Contributions paid. (Schedule I)		50	00
14. Interest. (Schedule I)			
15. Taxes. (Schedule I)		316	00
16. Losses from fire, storm, shipwreck, or other casualty, or theft. (Schedule I)			
17. Real estate. (Schedule I)			
18. Other deductions authorized by law. (Schedule I)			
19. Total deductions in items 13 to 18.		166	00
20. Net income (Item 12 minus item 19).		\$39,240	04

COMPUTATION OF TAX			
21. Net income (Item 20 above)	\$39,240	04	
22. Less: Personal exemption.			
23. Credits for dependents.			
24. Balance (before tax income).	\$39,240	04	
25. Less: Income tax paid at source.			
26. Balance of tax (Item 24 minus item 25).	\$5,000	02	
27. Normal tax (4% of item 21)	\$1,569	60	
28. Surplus on item 24. (See Instructions 29)			
29. Total (Item 27 plus item 28)	\$1,569	60	
30. Total tax (Item 26, or if you had a net long-term capital gain or loss, enter line 14, Schedule F)	\$5,000	02	
31. Less: Income tax paid at source.			
32. Balance of tax (Item 30 minus item 31).	\$5,000	02	

NOTE—See form entitled "DUPLICATE COPY" must be filed with this original return (It will be assessed if duplicate copy is not filed)

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Page 8

Schedule A.—INCOME RECEIVED FROM OTHERS CONSISTING OF SALARIES, WAGES, FEES, AND OTHER COMPENSATION FOR PERSONAL SERVICES. (See Instruction 1)

1. Name and address of employer and nature of income	2. Amount	3. Expenses (deductions)	4. Amount
	\$		\$
See attached sheet			
Total of column 2 minus total of column 4 (enter as item 1, page 1)			\$

Schedule B.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See Instruction 6)

1. Obligations or securities	2. Amount owned at end of year including your proportionate share of such obligations held by estate, trust, partnership, or common trust funds	3. Interest received or accrued during the year	4. Interest exempt from taxation	5. Interest on amount in excess of exemption
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	\$ 12,750.00	\$ 455.73	All	
(b) Obligations issued under Federal Farm Loan Act, or under such Act as amended			All	
(c) Obligations of United States issued on or before September 1, 1917			All	
(d) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness			All	
(e) United States Savings Bonds and Treasury Bonds		50	40	50
(f) Obligations of instrumentalities of the United States (other than obligations to be reported in (b) above)			None	XXXXX
(g) Total (enter as item 5, page 1)				\$

Schedule C.—INCOME FROM RENTS AND ROYALTIES. (See Instruction 8)

1. Kind of property	2. Amount	3. Depreciation (explain in Schedule E)	4. Royalties (explain below)	5. Other expenses (explain below)	6. Net profit (combine 2 minus sum of columns 3, 4, and 5) (enter as item 8, page 1)
	\$	\$	\$	\$	\$

Explanation of deductions claimed in columns 4 and 5

Schedule D.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See Instruction 9)

(State business name and address if different from name and address on page 1)		
1. Total receipts (state nature of business or profession)		\$
COST OF GOODS SOLD		
2. Labor	\$	
3. Material and supplies		
4. Merchandise bought for sale		
5. Other costs (itemize below)		
6. Plus inventory at beginning of year		
7. Total (lines 2 to 6)	\$	
8. Less inventory at end of year		
9. Net cost of goods sold (line 7 minus line 8)	\$	
If the production, manufacture, purchase and sale of merchandise is an income-producing factor, inventories are required. Enter "C," "U," or "M," on lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.		
OTHER BUSINESS DEDUCTIONS		
10. Salaries not included as "Labor" (do not deduct compensation for yourself)	\$	
11. Interest on business indebtedness		
12. Taxes on business and business property		
13. Losses (explain below)		
14. Bad debts arising from sales or services		
15. Depreciation, obsolescence, and depletion (explain in Schedule E)		
16. Rent, repairs, and other expenses (itemize below or on separate sheet)		
17. Total (lines 10 to 16)	\$	
18. Total deductions (line 9 plus line 17)		
19. Net profit (or loss) (line 1 minus line 18) (enter as item 9, page 1)		\$

Explanation of deductions claimed in lines 5, 13, and 16

Schedule E.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES C, D, F, AND G

1. Kind of property (if buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis	4. Assets fully depreciated in use at end of year	5. Depreciation claimed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in computing depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
		\$	\$	\$	\$			\$

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Schedule F.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See Instruction 14)

1. Kind of property (If summary sheet, state asset or description; details not shown below)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (contract price)	5. Cost or other basis	6. Expenses of sale and cost of improvements (or other) (attach statement of expenses to Schedule I, 1913)	7. Depreciation allowed (or other) (attach statement of depreciation to Schedule I, 1913) (explain in Schedule E)	8. Gain or loss (columns 3 plus column 6 minus columns 5 and 7)	9. Gain or loss to be taken into account	10. Amount
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 12 MONTHS									
			\$	\$	\$	\$	\$	100	\$
								100	
								100	
								100	
Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)								\$	
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 12 MONTHS BUT NOT FOR MORE THAN 24 MONTHS									
			\$	\$	\$	\$	\$	66%	\$
								66%	
								66%	
								66%	
Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)								\$	
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 24 MONTHS									
			\$	\$	\$	\$	\$	50	
								50	
								50	
								50	
Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)								\$	

SUMMARY OF CAPITAL NET GAINS OR LOSSES

1. Classification	2. Net short-term capital gain or loss (enter on line 10 (a), page 1, amount of gain shown in column 3)	3. Net gain or loss to be taken into account from column 10, above	4. Net gain or loss to be taken into account from participating and "common trust" funds	5. Total net gain or loss to be taken into account in columns 2, 3, and 4 of this summary	6. Do not have allowable (see Instruction 29)	
	Gain	Loss	Gain	Loss	Gain	Loss
1. Total net short-term capital gain or loss (enter on line 10 (a), page 1, amount of gain shown in column 3)	\$	\$	\$	\$	\$	\$
2. Total net long-term capital gain or loss (enter on line 10 (b), page 1, amount of gain or loss shown in column 3)	\$	\$	\$	\$	\$	\$

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the above items:
 If any of the above items were acquired by you other than by purchase, explain fully how acquired:

COMPUTATION OF ALTERNATIVE TAX

(To be used only in the case of a net long-term capital gain or loss)

1. Net income (line 20, page 1). (See Instruction 19)	\$	10. Normal tax (4% of line 9)	\$
2. (a) Net long-term capital gain (line 10 (b), page 1)		11. Surtax on line 6. (See Instruction 29)	\$
(b) Net long-term capital loss (line 10 (c), page 1)		12. Partial tax (line 10 plus line 11)	\$
3. Ordinary net income (line 1 minus line 2 (a) or line 1 plus line 2 (b)). (See Instruction 19)	\$	13. (a) 30% of net long-term capital gain (30% of line 2 (a))	\$
4. Less: Personal exemption. (From Schedule J-1)	\$	(b) 30% of net long-term capital loss (30% of line 2 (b))	\$
5. Credit for dependents. (From Schedule J-2)	\$	14. Alternative tax (line 12 plus line 13 (a) or line 12 minus line 13 (b))	\$
6. Balance (surtax net income)	\$	15. Total normal tax and surtax (line 10, page 1)	\$
7. Less: Interest on Government obligations, etc. (See Instruction 25)	\$	16. Tax liability (if a net long-term capital gain, on line 2 (a), enter line 14 or line 15, whichever is the lesser; if a net long-term capital loss, on line 2 (b), enter line 14 or line 15, whichever is the greater). (Enter on line 31, page 1)	\$
8. Earned income credit. (From Schedule K-1 or K-2). (See line 19)	\$		
9. Balance subject to normal tax	\$		

Schedule G.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS (See Instruction 10)

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expenses of sale and cost of improvements (or other) (attach statement of expenses to March 1, 1913)	6. Depreciation allowed (or other) (attach statement of depreciation to March 1, 1913) (explain in Schedule E)	7. Gain or loss (column 3 plus column 5 minus the sum of columns 4 and 6)
		\$	\$	\$	\$	\$
Total net gain (or loss) (enter as item 10 (c), page 1)						\$

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the above items:
 If any of the above items were acquired by you other than by purchase, explain fully how acquired:



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Schedule H.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 13, 14, 15, 16, 17, AND 18

Page 4

1. Item No.	2. Explanation	3. Amount	4. Item No. (Continued)	5. Explanation (Continued)	6. Amount (Continued)
	ATTACHMENT sheet	\$			\$

Schedule I.—NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE B. (See instruction C.)

1. Source of income	2. Nature of income	3. Amount
Share of dividends of fiduciary from share account in Federal Savings & Loan Assn. (included in items 7 and 25)		\$ 12.30

Schedule J.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 23 AND 24. (See instructions 23 and 24)

(1) Personal Exemption			(2) Credit for Dependents		
Status	Number of months during the year in each status	Credit claimed	Name of dependent and relationship	Number of months during the year Under 18 years old Over 18 years old	Credit claimed
Single, or married and not living with husband or wife	9	\$ 250			\$
Married and living with husband or wife	9	1975			
Head of family (explain below)					
Reason for support if over 18 years old					

Schedule K.—COMPUTATION OF EARNED INCOME CREDIT. (See instruction 26)

(1) If your net income is \$9,000 or less, use only this part of schedule	(2) If your net income is more than \$9,000, use only this part of schedule
Net income (item 20, page 1) \$	Earned net income (not more than \$14,000) \$ 14,000 --
Earned income credit (10% of net income, above)	Net income (item 20, page 1) 32,532 .71
	Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than \$300) 1,400 --

QUESTIONS

1. State your principal occupation or profession. Attorney
2. Check whether you are a citizen ☒ or a resident alien ☐.
3. If you filed a return for the preceding year, to which Collector's office was it sent? SAN FRANCISCO, CALIFORNIA
4. Are items of income or deductions of both husband and wife included in this return? Yes
5. State (a) Name of husband or wife if separate return was made Ira Claire Wallace
- (b) Personal exemption, if any, claimed thereon \$625.00
- (c) Collector's office to which it was sent SAN FRANCISCO
6. Check whether this return was prepared on the cash ☐ or accrual ☐ basis.
7. Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 501? (Answer "yes" or "no") no (If answer is "yes," attach statement required by instruction J.)

AFFIDAVIT. (See instruction E)

I/we swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code, as amended, and the regulations issued under authority thereof.

Subscribed and sworn to before me this 12th day of March, 1940

Clayton B. Lawrence
(Signature and title of officer administering oath)
A return made by an agent must be accompanied by sworn statement of agent. (See instruction E.)
NOTARY PUBLIC

Richard M. Worley
(Signature)
(If this is a joint return (not made by agent), it must be signed by both husband and wife. It must be sworn to before a proper officer by the spouse preparing the return. If neither or both prepare the return, it must be sworn to by both spouses.)

AFFIDAVIT. (See instruction E)

(If this return was prepared for you by some other person, the following affidavit must be executed)

I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the income tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this 12th day of March, 1940

Clayton B. Lawrence
(Signature and title of officer administering oath)
NOTARY PUBLIC



Richard M. Worley
(Signature of person preparing the return)
(Place of date or copy, etc., if any)

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SCHEDULE A.

Earnings of Mrs. Ina Claire Wallace
after March 16, 1939, date of her
marriage:

Salaries:

Lowes, Inc., M.G.M. Studio	\$52,000.00
Commissions on dresses and hats....	248.10

Total\$52,248.10

Business expenses:

California Unemployment Insurance tax	\$ 520.00
Motion Picture Relief Fund	260.00
A & S Lyons, agents' commissions	2,600.00
Harold Friedman, agent's commis- sions	2,600.00
Howard Reinheimer, attorney, re contracts, etc.	1,039.79
Val Horne, secretary	327.50
Dorothy Johnson, studio maid	625.00
Business stationery and sundries....	80.64
Dues—Screen Actors Guild	75.00
American Federation of Ra- dio Artists	6.00
Actors Equity	10.50
Treatments, massage, reducing, etc. ordered by studio	1,327.92
Wardrobe for "Ninotchka"	1,018.11
Automobile expenses (1½)	277.59
Gifts to Director and Secretary	63.93
Household expenses in Los Ange- les	4,630.33

Total expenses 15,462.31

Net 36,785.79

Community share, Mr. and Mrs.
Wallace, each 18,392.90

Earnings of Mr. W. H. Wallace, Jr.,
after March 16, 1939.

Distributive share Williamson & Wal-
lace, 310 Sansome St. (partner-
ship) 5,732.44

Business expenses:

Professional dues	31.50
Gertrude Vodvarka, secretary	237.50

Total expenses	269.00
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Net	5,463.44
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Community share, Mr. and Mrs.

Wallace, each	2,731.72
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Earnings of W. R. Wallace, Jr. prior
to March 16, 1939Distributive share Williamson & Wal-
lace

\$	897.56
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Business expense:

Professional dues\$ 22.00

Gertrude Vodvarka	62.50	84.50
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Net	\$	813.06
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SCHEDULE H

Contributions:

Community Chest of San Francisco	50.00
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Taxes paid	For Fed.Ret.	For State
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California, income, for 1938.....	761.10	
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On club dues	35.10	35.10
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On admissions	20.00	20.00
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816.20	55.10
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Item 14—Interest on federal income tax 1938.....\$.13
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[Endorsed]: T.C.U.S. Filed Feb. 1, 1943.

Mr. Murray: And as Respondent's Exhibit B, the [54] Federal Income Tax Return of Ina Claire Wallace for the calendar year 1939.

Judge Smith: That will be marked Respondent's Exhibit B and received in evidence.

(Federal Income Tax Return referred to marked Respondent's Exhibit B and received in evidence.)

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UNITED STATES

Page 1

INDIVIDUAL INCOME TAX RETURN 1939

INCOME OF MORE THAN \$1,000 FROM SALARIES, WAGES, INTEREST, DIVIDENDS, ANNUITIES, AND FOR INCOME FROM OTHER SOURCES REGARDLESS OF AMOUNTS

For Calendar Year 1939

and year beginning JAN. 1, 1939, and ending JAN. 1, 1940

Indicate the day of the month of the year for which the return is filed

and the month and year of the filing of the return

CLAYNE WALLACE

San Francisco, California

(Do not use these spaces)

2995
203881

72895

1940

1. Salaries and other compensation for personal services. (From Schedule A)	25,259	48
2. Dividends	90	00
3. Interest on bank deposits, notes, mortgages, etc.	823	38
4. Interest on corporation bonds		
5. Taxable interest on Government obligations, etc. (From Schedule B)		
6. Income (or loss) from partnerships, syndicates, pools, etc. (other than capital gains or losses). (From Schedule C)		
7. Income from fiduciaries. (From Schedule D)		
8. Income from annuities. (From Schedule E)		
9. Income (or loss) from business or profession. (From Schedule F)		
10. (a) Net short-term gain from sale or exchange of capital assets. (From Schedule G)		
(b) Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule H)		
(c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule I)		
11. Other income (including income from annuities) (From Schedule J)	92	97
12. Total income in items 1 to 11. (Enter taxable income in Schedule K)		\$ 27,367 60
DEDUCTIONS		
13. Contributions paid. (Schedule L)	96	50
14. Interest. (Schedule M)	3	44
15. Taxes. (Schedule N)	1,010	36
16. Losses from fire, storm, shipwreck, or other casualty, or theft. (Schedule O)		
17. Bad debts. (Schedule P)	7.00	00
18. Other deductions authorized by law. (Schedule Q)		
19. Total deductions in items 13 to 18		1,810 30
20. Net income (Item 12 minus item 19)		\$ 25,557 30

COMPUTATION OF TAX

21. Net income (Item 20 above)	\$ 25,557 30	28. Normal tax (4% of item 27)	\$ 925 29
22. Less: Personal exemption. (From Schedule J-1)	\$ 625 00	29. Surtax on item 24. (See instructions 27)	1,990 49
23. Credit for dependents. (From Schedule J-2)	400 00	30. Total (Item 28 plus item 29)	\$ 2,915 78
24. Balance (surtax net income)	\$ 24,532 30	31. Total tax (Item 30, or if you had a net long-term capital gain or loss, enter line 16, Schedule F)	
25. Less: Interest on Government obligations, etc. (See instructions 25)		32. Less: Income tax paid at source	
26. Earned income credit. (From Schedule E-1 or E-2)	1,400 00	33. Income tax paid to a foreign country on U.S. income (Attach Form 116)	
27. Balance subject to normal tax	\$ 23,132 30	34. Balance of tax (Item 31 minus items 32 and 33)	\$ 2,915 78

NOTE—One form marked "DUPLICATE COPY" must be filed with this original return (35 will be assessed if duplicate copy is not filed)

1-1

Schedule H.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 11, 15, 16, 17, AND 18

Page 4

See attached sheets

Schedule I.—NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE B. (See Instruction G)

1. Source of income

2. Nature of income

3. Amount

Schedule J.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 22 AND 23. (See Instructions 22 and 23)

(1) Personal Exemption

(2) Credit for Dependents

Status

Number of months during the year in such status

Credits claimed

Place of dependency and relationship

Number of months during the year
Under 18 years old
Over 18 years old

Credits claimed

Single, or married and not living with husband or wife

\$

Mrs. C. B. Claire,
mother

\$

12

400

--

Married and living with husband or wife

0

none

Head of family (explain below)

3

\$625.00

Maintains home for mother

Reason for support
if over 18 years old Aged - only support

Schedule K.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 25)

(1) If your net income is \$3,000 or less, use only this part of schedule

(2) If your net income is more than \$3,000, use only this part of schedule

Net income (Item 20, page 1)

\$

Earned income credit (10% of net income, above)

Earned net income (not more than \$14,000)

\$ 14,000

--

Net income (Item 20, page 1)

25,557

30

Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than \$300)

\$ 1,400

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QUESTIONS

1. State your principal occupation or profession **Address**
2. Check whether you are a citizen ☒ or a resident alien ☐
3. If you filed a return for the preceding year, to which Collector's office was it sent? **San Francisco**
4. Are items of income or deductions of both husband and wife included in this return? **yes**
5. State (a) Name of husband or wife if separate return was made **William R. Wallace, Jr.**

- (b) Personal exemption, if any, claimed thereon **\$2,125.00**
- (c) Collector's office to which it was sent **San Francisco**
6. Check whether this return was prepared on the cash ☒ or accrual ☐ basis.
7. Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 501? (Answer "yes" or "no") **no** (If answer is "yes," attach statement required by instruction J.)

AFFIDAVIT. (See Instruction E)

I/we swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code, as amended, and the regulations issued under authority thereof.

Subscribed and sworn to by **Wm. R. Wallace, Jr.****Wm. R. Wallace, Jr.**before me this **12th** day of **March**, 1940**Wm. R. Wallace, Jr.****Wm. R. Wallace, Jr.**

(Signature and title of officer administering oath)

A return made by an agent must be accompanied by power of attorney. (See Instruction E.)

NOTARY PUBLIC

My Commission Expires **October 29, 1947**

AFFIDAVIT. (See Instruction E)

(If this return was prepared for you by some other person, the following affidavit must be executed)

I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the income tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this **12th** day**Richard H. Norton****March**, 1940

(Signature of person preparing the return)

Wm. R. Wallace, Jr.

(Signature of person preparing the return)

(Signature and title of officer administering oath)

(Name of firm or company, if any)

[Printer's Note: Page 3 of 1939 Income Tax Return of Ina Claire Wallace is not reproduced, as it is identical with page 3 of the 1939 Income Tax Return of William R. Wallace, Jr. set out at page 89 of this printed record.]

SCHEDULE A

Earnings of Mrs. Ina Claire Wallace
after March 16, 1939, date of her
marriage:

Salaries:

Loews, Inc., M.G.M. Studio	\$52,000.00
Commissions on dresses and hats....	248.10

Total	\$52,248.10
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Business expenses:

California Unemployment Insurance tax	\$ 520.00
--	-----------

Motion Picture Relief Fund	260.00
----------------------------------	--------

A & S Lyons, agents' commissions	2,600.00
----------------------------------	----------

Harold Friedman, agent's commis- sions	2,600.00
---	----------

Howard Reinheimer, attorney, re contracts, etc.	1,039.79
---	----------

Val Horne, secretary	327.50
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Dorothy Johnson, studio maid	625.00
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Business stationery and sundies	80.64
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Dues—Screen Actors Guild	75.00
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American Federation of Ra- dio Artists	6.00
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Actors Equity	10.50
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Treatments, massage, reducing, etc., ordered by studio	1,327.92
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Wardrobe for "Ninotchka"	1,018.11
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Automobile expenses ($\frac{1}{2}$)	277.59
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Gifts to Director and Secretary	63.93
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Household expenses in Los Ange- les	4,630.33
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Total expenses	15,462.31
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Net	36,785.79
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Community share, Mr. and Mrs. Wallace, each	18,392.90
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Earnings of Mr. W. R. Wallace, Jr.
after March 16, 1939

Distributive share Williamson & Wallace	5,732.44
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Business expenses:

Professional dues	31.50
Gertrude Vodvarka, secretary	237.50

Total Expenses	269.00
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Net	5,463.44
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Community share, Mr. and Mrs. Wallace, each	2,731.72
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Earnings of Mrs. Ina Claire Wallace
prior to March 16, 1939

Salaries—Loews Inc., M.G.M. Studio	\$ 5,333.33
------------------------------------	-------------

Business expenses:

California Unemployment Insurance Tax	53.33
Motion Picture Relief Fund	11.67
A & S Lyons, agent's commissions	266.67
Harold Friedman, agent's commis- sion	266.67
Val Horne, secretary	100.00
Dorothy Johnson, studio maid	250.00
Dues—Screen Actors Guild	25.00
Treatments, massage, reducing, etc., ordered by studio	88.51
Automobile expenses ($\frac{1}{2}$)	136.63

Total expenses	1,198.47
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Net	4,134.86
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SCHEDULE C

Apartment at 3 East 69th St., New York City, under lease to September 1, 1941, with option to renew

Total rental received \$ 4,050.00

Deductions:

Total rental paid\$ 3,600.00

To Mary Michael, cleaning and taking care of rent, etc. 42.90

Window Cleaning Co. 6.00

To Mary Michael \$10; \$17.50; \$25. 52.00

Brown, Wheelock 75.00

Repairing holes, etc. (Ruby Ross Wood) 21.00

Lilian Kerning—cleaning, etc. 27.00

Window cleaning 3.60

Consolidated Edison Co. 9.10

N. Y. Telephone Co. 9.68

Renofab 5.50

Telegrams to New York 40.70

3,892.98

Improvements, etc.

S. W. Esrig—painter..... 200.00

Arthur J. Lockwood, shelving 89.39

N. Y. Tel. Co. extensions.. 48.35

337.74

Aliquot portion for 1939 126.65

Depreciation of own furniture 19.22 4,038.85

Net profit \$ 11.15

SCHEDULE E

Depreciation of property least at New York Apartment

Item	Cost	Date	Depreciation to end of year
Bookcases	\$260.00	Oct. 1939	5.20
Carpet	686.00	"	13.72
Shades	15.30	"	.30
			<hr/> 19.22

SCHEDULE H

Contributions paid:

European Film Fund	\$ 16.50
Red Cross	20.00
Salvation Army	10.00
Screen Actors Guild Benefit	50.00

Total 96.50

Interest Paid:

On additional assessment Federal Income Taxes for 1937	3.44
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Taxes Paid:

New York, income for 1938	\$ 884.50
California, " " 1938	125.86

Total\$1,010.36

Bad Debts:

Mme. Chevet, loaned in 1938	500.00
Mrs. H. H. DeMoll, Washington, D.C. loaned in 1938	200.00

Total\$ 700.00

[Endorsed]: T.C.U.S. Filed Feb. 1, 1943.

Mr. Murray: And may the respondent have permission to have these returns withdrawn in Washington and photostated and replaced with photostatic copies?

Judge Smith: Yes, indeed.

Mr. Murray: That's all.

Mr. Ray: May we have the usual time to file briefs, your Honor.

Judge Smith: Yes. I think probably they had better be filed concurrently. Each party may have until March 20th for the filing of a brief. Briefs

will be served upon opposing counsel and each party may have until April 5th for the filing of reply.

Mr. Murray: If your Honor please, when you say copies will be served on the opposing counsel do you mean by the Board or do you mean by us?

Judge Smith: They will be served by the Board unless you wish to serve them yourselves.

Mr. Murray: Yes. I wanted to point out that the briefs that we write here are not final. When we ship them [55] to Washington they are reviewed. Therefore I couldn't serve them with a copy that I know will be filed.

Judge Smith: The Board will serve them.

Mr. Murray: Yes, all right.

Mr. Wallace: Your Honor, then I suggest this: that I think your Honor has set March 20th as the date for the original briefs and April 5th for the reply. I think that narrow space of time there, with the present mail service, is such that we should probably have a few days after that date.

Judge Smith: All right. I will give you until April 15th for the filing of a reply.

Mr. Wallace: Thank you, your Honor.

(Hearing concluded.)

[Endorsed]: T. C. U. S. Filed Feb. 17, 1943.

[56]

Before the Tax Court of the United States

Docket No. 110143

In the Matter of

WILLIAM R. WALLACE, Jr.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

and

Docket No. 110144

In the Matter of

INA CLAIRE WALLACE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DEPOSITION OF INA CLAIRE WALLACE

Pursuant to oral stipulation, and on Tuesday, the 26th day of January, 1943, at the hour of 2:00 o'clock p. m. thereof, at the offices of Williamson & Wallace, Suite 1100, 310 Sansome Street, San Francisco, California, before me, Amy B. Townsend, a Notary Public in and for the City and County of San Francisco, State of California, personally appeared

INA CLAIRE WALLACE [59]

one of the petitioners herein, who, being by me first duly sworn, was thereupon examined and interrogated in said cause.

Appearances:

William R. Wallace, Jr., Esq., 310 Sansome Street, San Francisco, California, appearing on behalf of Petitioners.

Arthur L. Murray, (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Commissioner of Internal Revenue, Respondent.

Mr. Wallace: It is understood that Mrs. Wallace is called as a witness for the Petitioners in Docket No. 110143 and Docket No. 110144, which cases have been consolidated for hearing.

Mr. Murray: Yes. Off the record.

(Remarks off the record.)

Mr. Wallace: I will ask the Notary Public to swear the witness.

INA CLAIRE WALLACE,

being first duly sworn by the Notary Public to tell the truth, the whole truth, and nothing but the truth, was interrogated and testified as follows:

(Deposition of Ina Claire Wallace.)

Direct Examination

By Mr. Wallace:

Q. Mrs. Wallace, you are one of the Petitioners in this matter before the Tax Court of the United States? [60] A. Yes.

Q Were you and the Petitioner, William R. Wallace, Jr., married on the 16th day of March, 1939? A. Yes.

Q. Have you and the Petitioner, William R. Wallace, Jr., ever since been husband and wife?

A. Yes.

Q. Prior to the year 1939 where did you live?

A. New York City.

Mr. Murray: Off the record.

(Remarks off the record.)

By Mr. Wallace:

Q. What is your profession? A. Actress.

Q. Was that your profession during the year 1939? A. Yes.

Q. And had it been for several years prior thereto? A. Yes; several.

Q. In the course of your professional activity you appeared in a large number of plays in various cities in America and in England?

A. Yes.

Q. After your marriage on March 16, 1939, will you state where you actually resided during the balance of that year?

Mr. Murray: I would like to object to that as calling [61] for a conclusion of the issue.

(Deposition of Ina Claire Wallace.)

That is just for the record. Now, you may answer.

By Mr. Wallace:

Q. Start from March 16, 1939, and state where you were actually residing, where you were, in other words, what cities and places you were in during the balance of the year 1939.

A. I lived in San Francisco.

Q. Were you in San Francisco all the time?

A. No.

Q. Will you tell us, starting from March 16, where you were on March 16?

A. I was in Salt Lake City, as I remember.

Q. Then where did you go?

A. Then I went to La Quinta, California, on my honeymoon. Then I came to San Francisco for, I should think, four or six weeks. I don't remember exactly how long I was here.

Q. Then after you had come back to San Francisco where did you next go?

A. Back to Beverly Hills.

Q. About when did you arrive in Beverly Hills?

A. You mean that particular time?

Q. That is right.

A. I should think it must have been around the first of May, as I remember. I was to appear in a picture which had already started. I think the picture started around the first [62] of May. I do not remember exactly what time I got there because I didn't start with the beginning of the picture, didn't start to work with the beginning of the picture.

(Deposition of Ina Claire Wallace.)

Q. Then from the first of May, how long did you remain in Beverly Hills?

A. You mean continuously?

Q. Continuously, yes.

A. I broke it sometime during the taking of the picture and came up to San Francisco for a couple of weeks. I think it was around in July, something like that, in the middle of the taking of the picture. I had a few weeks off and I went up to San Francisco. Then I went back again and stayed until September, about the 15th of September, I should think, because I know I left the house a few days before the end of the lease was up. The contract was up at the same time, just about that period. The 15th of September, I think, was the date.

Q. Did you have a house in Beverly Hills?

A. Yes.

Q. Was that house located at 1711 Tropical Avenue?

A. Yes.

Q. In Beverly Hills?

A. Yes.

Q. After September 15, and until the end of the year, December 31, 1939, where were you?

A. In San Francisco.

Q. Since December 31, 1939, have you lived in San [63] Francisco?

A. Yes.

Q. And you now live in San Francisco?

A. Yes.

Q. Now, after you came to San Francisco in the early part of September, 1939, were you, be-

(Deposition of Ina Claire Wallace.)

tween the period of September and the end of 1939, engaged in any professional activity?

A. You mean was I acting? I wasn't acting.

Q. You were not acting?

A. No. I was reading plays in connection with my professional activity.

Q. Will you explain a little bit more what you were doing in connection with the reading of plays?

A. I don't know quite what you mean. I was reading plays, sending wires, and making long distance telephone calls in connection with them.

Q. Let us assume that the Judge doesn't know anything about the theatrical profession. Will you explain the process of getting a play, that is, what do you do, or what did you do during that period?

A. You just read plays.

Q. Where do your plays come from?

A. New York City.

Q. Who sends them?

A. Agents, managers, authors, friends. [64]

Q. What do you do in connection with them?

A. You read them, then you discuss them, and return them at great expense. They never enclose stamped envelopes for them. You send telegrams, you write letters, you talk and talk and talk, make long distance telephone calls, and what not.

Is that what you want to know?

Q. Yes. Were you in communication with and did you send telegrams and talk on the long distance telephone with theatrical agents and managers in New York during that period?

(Deposition of Ina Claire Wallace.)

A. Yes; certainly.

Q. Did your husband have anything to do with the reading of those plays?

A. Yes, he did.

Q. What did he have to do with it?

A. He read, poor man, and talked and helped a great deal, I must say.

Q. At the time of your marriage—and just answer this question “Yes” or “No”—was there any agreement made between you and your husband as to where you should reside?

A. Was there an agreement made?

Q. Yes. A. Yes.

Q. What was that agreement—where were you to reside?

A. We were to reside in San Francisco.

Mr. Wallace: Off the record.

(Remarks off the record.) [65]

By Mr. Wallace:

Q. Mrs. Wallace, I think you testified you started making a picture for Loew's, Inc. in Beverly Hills about the first of May, 1939?

A. Yes. I think the picture started just about then. I don't think I started to work for a couple of weeks. I don't know exactly when it was, but I went down there just about that time.

Q. About when did that picture end, the making of that picture?

A. I should think about the last of August or the first of September. I think by the time re-

(Deposition of Ina Claire Wallace.)

takes were taken it went into September, right at the finish of summer. I might have had a week off.

Q. Did you make any other motion picture from the period, March 16 to December 31, 1939?

A. No; just one picture. It is a very fluid business. They never start when they say they are going to start, and they never finish when they think they are going to finish.

Q. Now, coming back to the agreement with Loew's, Inc., during the year 1939 and prior to your marriage did you make any other picture?

A. I did make a picture, but it never was finished.

Q. Will you explain a little bit what you mean?

A. They asked, as a special favor of me, if I would do it. They had made the contract from an earlier date, which was [66] necessary because they didn't know when the picture they wanted me for would be started, and to run later so they would have me under contract during that period. In that way they could start any date they wanted to. In the meantime, they didn't start as soon as they thought they would, and asked me to do this other picture to help them out, which I agreed to do and did do. However, the picture was never released with me in it. They put it on the shelf. I don't know as that is of any interest to you. That is my story and it has nothing to do with this case. I did work for them for a few weeks at their request.

(Deposition of Ina Claire Wallace.)

Q. When was that?

A. I don't know whether that was the last of November, beginning the last of November or December, but it was around then. I either started in November or the first of December. I don't really remember.

Q. Of 1938? A. Yes.

Q. How long were you working in that picture?

A. I think about six weeks; five or six weeks.

Q. That would take it up to the first part of January? A. Yes.

Q. Then from the first part of January, 1939, until May you were not engaged in the making of any picture? A. No.

Q. Now, during the period from the end of that picture [67] in January until your marriage where were you? A. In Beverly Hills.

Q. All the time?

A. No. I was in San Francisco part of the time.

Q. How much of the time were you in San Francisco?

A. There was a period of about four or five weeks—and time in between I was here too—when I was here, but not constantly. I came up, and went back, and came up again.

Q. Now, going back to Beverly Hills, during the period of the whole year, 1939, you rented two houses? A. Yes.

Q. You testified as to one house, the house that was rented? A. In March; yes.

(Deposition of Ina Claire Wallace.)

Q. And prior thereto you had rented another house? A. Yes.

Q. Mrs. Wallace, will you tell us, during the year 1939 and after your marriage, whether or not you discussed your husband's business with him?

A. Yes, I did.

Q. Did you discuss your professional activities with him? A. Yes.

Q. Mrs. Wallace, I hand you a photostatic copy of a document and ask you, first, if this signature that is written under the word "Accepted" is your signature? [68]

A. (Examining document and signature) Yes.

Q. I call your attention also to a rider attached to it. Does that also bear your signature?

A. (Examining rider and signature) Yes.

Q. Does this document purport to be your agreement with Loew's, Inc.? A. Yes.

Mr. Murray: Off the record.

(Remarks off the record.)

Mr. Wallace: I will offer this photostatic copy of the contract as Petitioner's Exhibit No. 1.

(The document above referred to was offered in evidence and marked for identification as Petitioner's Exhibit No. 1).

[Printer's Note: Petitioner's Exhibit No. 1 is set out at page 46 of this printed Record.]

Mr. Wallace: It is agreed between counsel for both parties that this exhibit, Petitioner's Exhibit No. 1, may be withdrawn for the purpose of having

(Deposition of Ina Claire Wallace.)

further copies made with the understanding that when copied it will be introduced in evidence at the hearing.

Mr. Murray: So stipulated.

By Mr. Wallace:

Q. Mrs. Wallace, aside from this document, Petitioner's No. 1, did you have any other understandings or agreements with Loew's, Inc.?

A. Yes. I had an oral understanding with Loew's Inc. that I was employed for Miss Garbo's picture at a salary equal to my normal theatrical season's earnings to be paid in weekly installments of \$2,000.00 a week for a period of 34 weeks during a 40 week season beginning November 1938 and ending in September 1939. I agreed to be available in Los Angeles during that period and to do one or more other pictures for them if the pictures met with my approval. [69]

Mr. Wallace: It is stipulated between the parties that [70] the total amount of deductions here in question, half of which has been claimed by each of the Petitioners herein on his or her separate Federal income tax return for the calendar year 1939, all of which has been disallowed by the Respondent in his deficiency notices in the respective cases, is not in dispute; that such total deduction consists of the personal living expenses of Petitioner, Ina Claire Wallace, incurred at Beverly Hills during the period from March 16, 1939, to September 15, 1939; and that during all of said period she

(Deposition of Ina Claire Wallace.)

was employed by Loew's, Inc. under the terms of the agreement, a copy of which has been offered in evidence as Petitioner's Exhibit No. 1.

Mr. Murray: So stipulated.

By Mr. Wallace:

Q. Mrs. Wallace, at all times since March 16, 1939, did you intend to live in San Francisco?

A. Yes.

Q. At any time during that period have you intended to live anywhere else? A. No.

Q. And since March 16, 1939, have you from time to time left San Francisco for professional engagements? A. Yes.

Mr. Murray: Off the record.

(Remarks off the record.)

By Mr. Wallace: [71]

Q. From September—so the record will be clear—from September 15, 1939, when you arrived in San Francisco, did you remain in San Francisco the balance of that year?

A. Just a minute. Let me see, when did I go east to do the summer stock? No, it wasn't that year. Yes, I was here.

Mr. Wallace: I think that clears that up, Mr. Murray.

Mr. Murray: Off the record.

(Remarks off the record.)

Mr. Wallace: That is all.

(Deposition of Ina Claire Wallace.)

Cross Examination

By Mr. Murray:

Q. Mrs. Wallace, during the 10 year period prior to 1938, where did you consider your residence to be?

A. I considered my residence during that period to be in California from 1929 to about August, 1932; then I went back to Connecticut and lived there until about March or April of 1936; then I lived at the Pierre Hotel in New York City until I came to California in November 1938 and since I married I have considered my residence to be San Francisco. [72]

Q. Mrs. Wallace, during the ten-year period prior to 1938 did you reside in one or more places?

A. Yes.

Q. Well, which?

A. I resided in New York City, but I traveled all over the country. It is difficult to answer that question unless I know what you mean.

Q. I want to bring out whether you kept a residence in New York City during the ten-year period prior to 1938 and up to the time you went to Hollywood.

A. Yes. Wait a minute. I had a house in the country, too.

Mr. Wallace: Let me see if we can clear that up. Off the record.

(Remarks off the record.) [73]

(Deposition of Ina Claire Wallace.)

By Mr. Murray:

Q. Where did you file your income tax return for the years prior to 1938, in New York or in Connecticut?

A. In Connecticut. My home was in Connecticut. My business was in New York City. I am not sure there wasn't a year or two in the middle that I didn't file an income tax return from New York City. I think that ought to be checked up with Howard Rinheimer, because I don't know where one year left off and another began as I sold my house in Connecticut.

Q. Did you have a residence in Connecticut for a number of years? A. Yes.

Q. How long?

A. You asked about a ten-year period. I wasn't in New York for ten years. I was in Connecticut part of that time.

Q. While a resident of Connecticut did you also have an apartment in New York City?

A. Yes.

Q. Did I understand you to say your business residence was in New York and your personal residence in Connecticut at that time? A. Yes, sir.

Q. During that whole ten-year period?

A. Yes.

Q. When you came out to Hollywood—

Mr. Wallace: I don't think that answer is quite correct. [74] Off the record.

(Remarks off the record.)

(Deposition of Ina Claire Wallace.)

By Mr. Murray:

Q. Approximately when did you cease to have a residence in Connecticut?

A. About 1936, I should think.

Q. And at that time where did you take up a residence?

A. I lived at the Pierre Hotel in New York City.

Q. Did you continue to live in New York City from that time in 1936 until you came to Hollywood in 1938? A. Yes.

Q. Where did you consider your personal residence during that period from 1936 until you went to Hollywood in 1938? A. New York City.

Q. Now, when you left New York City did you still have an apartment under lease there?

A. Yes.

Q. Where was that, please?

A. That was at—it was a new apartment—No. 3 East 69th Street, I think.

Q. How long a lease did you have at that time, do you recall?

A. I think it was a three-year lease with options.

Q. What did you do with that apartment when you came to Hollywood in the fall of 1938?

A. I left it there; it just sat there. [75]

Q. Did you not sub-lease it?

A. Yes, I did subsequently; that is right. To three successive parties.

(Deposition of Ina Claire Wallace.)

Q. What was the history of the remainder of the lease after that time, the New York lease—what happened to the apartment?

A. Well, the lease ran out its three years and that was the end of it.

Q. Did you ever live in it at all after 1938?

A. No. I never even slept in it once. I was still living at the Pierre Hotel, and the hotel had just been furnished for me when a long distance telephone call came in and urged me to come out to California. I hadn't even moved into my apartment. I packed my baggage and left. I never moved into the apartment at all.

Q. Did you ever spend any considerable time in Hollywood prior to 1938?

A. Yes. I was married there. I lived there once before.

Q. Do you recall when and to what extent, the approximate extent the time was?

A. I lived there—let me see. I was married for a little over a year. I was married in May, 1929.

Q. Then practically how long did you continue to live there?

A. I lived there until—I suppose my legal residence was still there, but I went east to do a picture in, I think, October or November of 1930. Let me see—then I lived there [76] for over a year; yes, I lived there over a year, a year and a few months.

Q. Then did you return to Hollywood after that time, after that period?

(Deposition of Ina Claire Wallace.)

A. Yes. You want dates, don't you?

Q. Approximately. I want the periods of time more than dates.

A. It is hard for me to remember. It is all very choppy. I am afraid I can't give dates without actually looking up the contracts, and things, because I came back, and I went away again. I know I had a contract with Mr. Goldwyn.

Q. Where, in Hollywood?

A. Yes. That was later on.

Q. It was after 1930? A. Oh, yes.

Q. Have you any idea of the extent of that engagement in time?

A. I think that was about—it might have been six months.

Q. At that time?

A. I remember I went back east—that was a canceled contract—and went abroad. That was in the wintertime. I came back in the spring and did a play, which I started in Cleveland, Ohio. Anyway, by that time it was spring and then I came out here.

Mr. Wallace: With the play? [77]

The Witness: With the play.

By Mr. Murray:

Q. To San Francisco?

A. I played here also. It was sort of a tour. I jumped from Cleveland out here to Hollywood, where we rehearsed another company, and then we came up the coast to play two or three cities,

(Deposition of Ina Claire Wallace.)

and then went back to Hollywood. That was in the theater, not pictures.

Q. Do you remember approximately what year that was?

Mr. Wallace: What play was that?

The Witness: Reunion in Vienna.

Answering your question, it was in 1932, I should think.

By Mr. Murray:

Q. Where did you consider your legal residence to be during that period?

A. Still in California.

Q. Now, as I understand it, with respect to the contract with Loew's, Inc., a copy of which is offered in evidence, you came to Hollywood in the fall of 1938, is that right? A. This time?

Q. Yes.

A. Yes; the latter part of November or the first of December, around there.

Q. Where did you live when you first came to Hollywood in the fall of 1938?

A. Beverly Wilshire Hotel for a few weeks, and then I [78] took a house on Camden Drive. I have forgotten the number.

Q. How long did you have the house?

A. Well, let me see—I had it about three months. I wasn't there half of the time.

Q. When you signed this contract with Loew's, Inc. did you have some idea of how long you thought it would take to complete it?

(Deposition of Ina Claire Wallace.)

A. Well, it depended, of course, on when we started. The starting date was very indefinite. They didn't know. That was the reason I made the contract because they couldn't give me any date, you see, and wanted me especially for this particular picture.

Q. As a matter of fact, it covered a period of time from sometime in November or early December, 1938, until September 15, 1939, is that right?

A. That is right.

Mr. Wallace: The contract is dated November 18, 1938, if you want that date.

Mr. Murray: Let the record show the contract is dated November 18, 1938.

The Witness: That was on my arrival here. It began the day I arrived in Hollywood.

By Mr. Murray:

Q. You arrived in Hollywood on that date?

A. On that date; yes.

Q. And you signed the contract as of that date?

[79]

A. Yes, I presume so. I don't think I signed the contract until I got there. They always say, "We need you tomorrow," and then you don't work until six months.

Q. When you executed this contract and, in connection with it, came to Hollywood, did you have any special intention of what you would do when the contract was completed or terminated?

A. Well, at that time I supposed I would go back to New York again.

(Deposition of Ina Claire Wallace.)

Q. Then I understand that in connection with that contract you put some work on one picture for six weeks or thereabouts? A. Yes.

Q. And which picture was not completed, as far as you were concerned? A. That is right.

Q. There was a waiting period in between then and the time when you started making a picture during May?

A. The picture I was really engaged for; yes.

Q. And that picture continued practically until September 15, 1939, or thereabouts?

A. Yes. I don't know whether it lasted quite through the time. Anyway, they had to pay me to the end.

Q. You say they did have to pay you?

A. Yes, because that was the duration of the contract.

Q. Did you receive pay during that whole period, or [80] were there periods between November 18, 1938, and September 15, 1939, when you did not receive any payment under this contract?

A. They paid me by the week, really, for the picture. They made it on terms of weekly payments.

Q. And you received pay under the contract for the whole period, that is, from the beginning to the end of the contract?

A. Yes. I think there was some talk about six weeks in there for which they didn't pay me. What was that about? I just don't remember.

(Deposition of Ina Claire Wallace.)

Mr. Murray: Off the record.

(Remarks off the record.)

By Mr. Murray:

Q. According to your memory, how many weeks were you paid in connection with your full contract with Loew's, Inc.?

A. For approximately 34 weeks at \$2,000 a week.

Q. I understood you to state on direct examination that you made an agreement with Mr. Wallace as to your residence from the date of your marriage forward, is that right? A. Yes.

Q. Do you recall approximately when you made such an agreement?

A. At the time we were married.

Q. Do you recall approximately what the agreement was, that is, what was said?

A. Well, I think I said to Mr. Wallace, "You live a long, [81] long way from me." It was either a question of Mr. Wallace coming east to live where I lived, or my coming here to live where he lived, and I decided I would rather come to live where he did, and he agreed that was a nice thing to do. I said, "I think I have traveled enough." He had his roots here so we decided to stay here.

Q. Since your marriage to Mr. Wallace have you continued to proceed with respect to your profession as you had before that time?

A. Well, I don't know just what you mean by that.

(Deposition of Ina Claire Wallace.)

Q. Do you still hold yourself open for contracts of any kind in your profession? A. Yes.

Q. And at any location? A. Yes.

Q. Have you been away from San Francisco for any considerable periods of time since 1939 in connection with your profession?

A. Yes. In the summer of 1940 I spent from June until about September in the east playing, and then returned here. Then I went east again to do a play in the fall of 1940. In November I went to New York to discuss the play further, and rehearsed the play, and we opened in—it is difficult to remember dates—we opened in January on the road. We played on the road for about six weeks and then we went to New York in February. [82]

Q. 1941?

A. Yes, 1941. We stayed in New York a couple or three months. I came back here, I think, in April, the middle of April. The play closed and I came straight back here again.

Q. There is just one point that I want to go back on a little bit to see if I understand this point correctly. I understand that when you first went to Hollywood in November, 1938, you lived at a hotel for a period of several weeks? A. Yes.

Q. Then you rented a house for three months?

A. No, I had an apartment as well. I hadn't moved into the apartment yet.

Q. I don't mean in New York. I mean in Hollywood or Beverly Hills.

A. Oh—I am sorry.

(Deposition of Ina Claire Wallace.)

Q. You lived at a hotel in Beverly Hills for a matter of several weeks?

A. At the Beverly Wilshire Hotel, yes, for two or three weeks.

Q. And then you leased a house for a period of three months, is that right? A. Yes.

Q. Then you leased still another house as of March 15, 1939? A. Yes.

Q. Until September 15, 1939, in Beverly Hills?
[83]

A. That is right.

Q. And the rent of that house, that last house you leased, is the main item in the deductions here involved in this case? A. That is right.

Mr. Wallace: That is right.

Mr. Murray: Off the record.

(Remarks off the record.)

Mr. Murray: On the record.

The Witness: It is a coincidence that the lease of the house happened to start on March 15, because it was engaged before I had decided to marry Mr. Wallace. If I hadn't already rented the house before I had decided to marry Mr. Wallace, I would never have taken the house. I would have stayed in a hotel instead.

Mr. Murray: That is all.

Redirect Examination

By Mr. Wallace:

Q. Mrs. Wallace, you testified, I think, on cross examination by Mr. Murray that at the time you

(Deposition of Ina Claire Wallace.)

left New York to come to California to do the picture you intended to return to New York?

A. Oh, yes.

Q. That is, because you considered your residence there? A. Yes.

Q. And at that time you did not intend to make California your home? [84] A. No.

Q. When did you change your mind?

A. When I got married.

Q. Mrs. Wallace, have you since your marriage from time to time gone east on business?

A. Yes.

Q. Have you from time to time accompanied your husband east on business? A. I have.

Q. Have you sometimes gone alone on business?

A. Yes.

Q. And has he sometimes gone alone on business? A. Yes.

Mr. Wallace: I think that is all.

Mr. Murray: That is all.

(Signed) INA CLAIRE WALLACE

State of California

City and County of San Francisco—ss.

I, Amy B. Townsend, a Notary Public in and for the City and County of San Francisco, State of California, do hereby certify:

That the witness in the foregoing deposition named, Ina Claire Wallace, was by me duly sworn to tell the truth, the whole truth, and nothing but

the truth in the within entitled cause; that said deposition was reported by C. W. Johnson, a competent court reporter and a disinterested person, and was thereafter transcribed by him into long-hand typewriting; that when so transcribed said deposition was read to or by the witness, and, after being by her corrected in all particulars desired, was by said witness subscribed in my presence.

In Witness Whereof, I have hereunto set my hand and affixed my seal of office, this 30th day of January A.D. 1943.

[Seal]

AMY B. TOWNSEND

Notary Public in and for the
City and County of San
Francisco, State of California

[Endorsed]: T. C. U. S. Filed Feb. 1, 1943. [86]

The Tax Court of the United States
Washington

Docket No. 110143

WILLIAM R. WALLACE, JR.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE OF CLERK TO
TRANSCRIPT OF RECORD

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing

pages, 1 to 97, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 24th day of August, 1943.

(Seal)

B. D. GAMBLE,

Clerk, The Tax Court of the
United States.

The Tax Court of the United States
Washington

Docket No. 110144

INA CLAIRE WALLACE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE OF CLERK TO
TRANSCRIPT OF RECORD

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 98, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings

on file and of record in my office as called for by the Praeceptum in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 24th day of August, 1943.

(Seal)

B. D. GAMBLE,

Clerk, The Tax Court of the
United States.

[Endorsed]: No. 10547-48. United States Circuit Court of Appeals for the Ninth Circuit. William R. Wallace, Jr., Petitioner, vs. Commissioner of Internal Revenue, Respondent. Ina Claire Wallace, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petitions to Review Decisions of The Tax Court of the United States.

Filed September 10, 1943.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals.

Case No. 10547

WILLIAM R. WALLACE, JR.,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

MOTION TO CONSOLIDATE PROCEEDINGS

To the Honorable United States Circuit Court of
Appeals:

Come Now the Appellant, William R. Wallace, Jr., and the Appellee, Commissioner of Internal Revenue, and respectfully move this Honorable Court that the above entitled proceeding be consolidated with that certain proceeding wherein Ina Claire Wallace is Appellant and the Commissioner of Internal Revenue is Appellee, Case No. 10548, and as grounds for their motion allege as follows:

1. That the two proceedings were consolidated in the Tax Court of the United States, and the Memorandum of Opinion of that Court covers both cases;

2. That, except for the petitions of the respective appellants and the respective answers of the appellee thereto, both cases were heard and determined in the Tax Court of the United States upon a single record.

3. That appellant and appellee do hereby stipu-

late that the two cases may be heard upon a single printed record.

4. That the consolidation of the two proceedings will facilitate the hearing and determination of the matters by this Court.

Wherefore appellant and appellee pray this Honorable Court that it consolidate the above entitled proceeding with the proceeding wherein Ina Claire Wallace is appellant and that the consolidation may be heard upon a single printed record in both cases.

Dated: September 21st, 1943

WILLIAM R. RAY,

Attorney for Appellant.

SAMUEL O. CLARK, JR.,

Attorney for Appellee.

So Ordered:

WILLIAM DENMAN,

United States Circuit Judge.

[Endorsed]: Filed Sept. 28, 1943. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals
for the Ninth Circuit

Case No. 10547

WILLIAM R. WALLACE, JR.,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

Case No. 10548

INA CLAIRE WALLACE,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

STIPULATION CONCERNING DESIGNA-
TION OF RECORD.

To the Clerk of the above entitled Court:

The respective appellants in each of the above entitled cases and the appellee therein have heretofore moved this Honorable Court for a consolidation of the above entitled cases and for an Order of said Honorable Court to permit the filing of a single printed record to cover both of said cases. The respective appellants and appellee hereby stipulate and designate the record proceedings and evidence to be contained in said single record on appeal to be the following, to-wit:

1. The petition of William R. Wallace, Jr., together with the exhibits attached thereto;
2. The answer of appellee thereto;
3. Petition of Ina Claire Wallace, together with the exhibits attached thereto;
4. Answer of appellee thereto;
- 4a. Memorandum Opinion of The Tax Court of the United States;
5. Decisions entered on May 7, 1943 pursuant to determination by the Tax Court of the United States as set for in said Memorandum Opinion.
6. Transcript of Testimony in question and answer form taken and received before the Hon. Charles P. Smith, on the 1st day of February, 1943, together with the deposition of Ina Claire Wallace offered in evidence at said hearing.
7. Any and all exhibits offered and received at said hearing on February 1, 1943.

Dated :

WILLIAM R. RAY,

Attorney for appellant William R. Wallace, Jr.

W. R. WALLACE,

Attorney for appellant Ina Claire Wallace.

SAMUEL O. CLARK, JR.,

Attorney for appellee.

[Title of Circuit Court of Appeals and Causes.]

STATEMENT OF POINTS.

The question in issue rises under the provisions of section 23 (a) of the Internal Revenue Code. That section permits the deduction of traveling expenses, including the entire amount expended for meals and lodging while away from home in the pursuit of a trade or business.

The appellants are husband and wife maintaining their residence in San Francisco. They filed separate returns with the Collector of Internal Revenue for the year 1939. The Commissioner disallowed expenses incurred by appellant Ina Claire Wallace during the period she was engaged in making a motion picture in Los Angeles, California. The question presented on this appeal is whether the petitioners, or either thereof, are entitled to deduct as ordinary and necessary business expenses for the calendar year 1939 certain living expenses incurred by the appellant Ina Claire Wallace in Los Angeles, California while in pursuit of her vocation as an actress and one-half of which expenses were deducted by each of the appellants.

Dated: San Francisco, California, October 8th, 1943.

WILLIAM R. RAY,

W. R. WALLACE,

Attorneys for Appellants.

(Affidavit of Service by mail attached.)

[Endorsed]: Filed Oct. 8, 1943. Paul P. O'Brien,
Clerk.

Nos. 10,547-10,548

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM R. WALLACE, JR.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

INA CLAIRE WALLACE,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

(CONSOLIDATED
CASES)

BRIEF OF PETITIONERS ON REVIEW.

W. R. WALLACE, JR.,
310 Sansome Street, San Francisco,
Attorney for Petitioner,
Ina Claire Wallace.

W. R. RAY,
310 Sansome Street, San Francisco,
Attorney for Petitioner,
W. R. Wallace, Jr.

WILLIAMSON & WALLACE,
310 Sansome Street, San Francisco,
Of Counsel.

FILED

NOV 30 1943

PAUL B. O'BRIEN

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Nos. 10,547-10,548

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM R. WALLACE, JR.,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

INA CLAIRE WALLACE,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

(CONSOLIDATED
CASES)

BRIEF OF PETITIONERS ON REVIEW.

JURISDICTION.

The taxpayers' petition for review herein involves the deficiency in individual income taxes for the taxable year 1939 in the amount of \$558.41 in respect of petitioner William R. Wallace, Jr. (R. p. 32) and in the amount of \$503.41 in respect of petitioner Ina Claire Wallace (R. p. 33) and is taken from decisions of the Tax Court of the United States entered May 7, 1943. (R. pp. 32-33.) The case is brought to this Court by petitions for review filed August 4, 1943 (R.

pp. 34, 36), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

OPINION BELOW.

The only previous opinion in this case is the memorandum opinion of the Tax Court of the United States (R. pp. 25-32) which is not recorded.

STATUTES AND REGULATIONS INVOLVED.

The pertinent statute is Section 23 (a) (1) of the Internal Revenue Code and Article 23 (a) (1) of Treasury Regulations 101.

QUESTION PRESENTED.

The question presented by the petitions for review is whether petitioners, or either of them, are entitled to deduct from income for the year 1939 living expenses incurred away from their home in San Francisco, and which they deducted, one-half each, in their returns filed for 1939.

STATEMENT OF THE CASE.

This case arises on petitions to review decisions of the Tax Court of the United States entered on May 7, 1943 determining a deficiency in income tax for the year 1939 against petitioner William R. Wallace, Jr., in the amount of \$558.41 and against petitioner Ina Claire Wallace in the amount of \$503.41. The

question presented by the petition for review is whether the petitioners, or either thereof, are entitled to deduct as ordinary and necessary business expenses for the calendar year 1939 certain living expenses incurred by the petitioners in Los Angeles, California, and one-half of which expenses were deducted by each of the petitioners.

The applicable Federal Taxing Statute is Section 23 (a) of the Internal Revenue Code, which reads as follows:

“SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) Expenses.—

(1) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.”

Petitioners are husband and wife and were married on March 16, 1939. (R. p. 80.) Petitioner Ina Claire Wallace is a well known actress and petitioner William R. Wallace, Jr. is a lawyer and has resided and practiced law in San Francisco since 1927. (R. p. 79.)

Upon their marriage, the petitioners agreed to maintain their home and residence in San Francisco and have done so since the date of their marriage. (R. p. 122.) Prior to her marriage, petitioner Ina Claire Wallace was a resident of New York. During the year 1939, petitioner Ina Claire Wallace was engaged in the making of motion pictures for approximately two weeks during the month of January and for approximately three months during the months of May, June, July and August. As compensation for these services she was paid a sum equal to her normal theatrical season's earnings, which sum was paid at the rate of \$2000 per week for 34 weeks out of the total forty weeks elapsing from January 1 to September 15, 1939. Under the terms of her agreement with the motion picture company she agreed to be available during the 40-week period and to make other pictures for the company if they met with her approval. Several other pictures were offered to her, but were not made by her as she refused to accept them. During the year 1939, she resided in San Francisco for some weeks prior to her marriage on March 16th and did not return to Los Angeles until about May 1st. She then remained in and about Los Angeles except for a few weeks in San Francisco until September 15, 1939, at which time she returned to her home and residence in San Francisco and remained there during the balance of the year. She was therefore in Los Angeles approximately 6 months of the calendar year. (R. pp. 106, 110, 113.)

During the period of time spent in San Francisco after their marriage, both petitioners reviewed a

great many plays which various authors and producers had submitted for approval. Mrs. Wallace appeared in one of such plays in New England for two or three months in the summer of 1940 and in the fall of that year began rehearsals for another play so chosen and which opened on the "road" in January 1941. The play continued on the "road" and in New York until about the middle of April when petitioner returned to her home in San Francisco. (R. p. 123.)

Petitioners during 1939 and since that date have both been outside of the State of California on business, sometimes together and sometimes separately. (R. p. 125.)

The petitioners filed separate income tax returns for the year 1939. (R. p. 15.)

Each petitioner returned one-half of the community income and took credit for one-half of the community expenses. (R. pp. 15 and 16.)

One-half of each of the ordinary and necessary expenses paid by each of the petitioners while away from home in the pursuit of their business were charged as expenses on each return. (See Ina Claire Wallace Income Tax Return, R. p. 93.)

The traveling and living expenses of petitioner William R. Wallace, Jr., while away from home were not challenged—the only question being the propriety of the deduction of petitioner Ina Claire Wallace's expenses. (R. p. 112.)

The Commissioner of Internal Revenue and the Tax Court of the United States disallowed the ex-

penses upon the theory that the petitioner Ina Claire Wallace had, of necessity, established a "home" in Los Angeles during the period of her employment there, and, therefore, that the expenses were not "ordinary and necessary business expenses incurred while away from home in the pursuit of a trade or business", and upon the further ground that the question was in the opinion of the Court not in any manner affected by the laws of the State of California. (Opinion of Tax Court, R. p. 31.)

SPECIFICATION OF ERRORS.

1. The Tax Court of the United States erred in its construction of Sec. 23 (a) (1) of the Internal Revenue Code.

2. The Tax Court of the United States erred in its determination that the petitioner Ina Claire Wallace established a "home" in the City of Los Angeles during the calendar year 1939.

3. The Tax Court of the United States erred in its determination that the "home" and place of business of petitioners was not affected by the community property and domiciliary laws of the State of California.

4. The Tax Court of the United States erred in its decision that the taxpayer petitioners were not entitled to the deductions claimed upon their respective income tax returns for the year 1939 and were liable for deficiencies in income tax for that year.

SUMMARY OF ARGUMENT.

In its memorandum opinion, the Tax Court of the United States admits that San Francisco was the domicile and legal residence of both petitioners. (R. p. 31.) The Tax Court makes no suggestion that San Francisco was not the "home" of both petitioners as that word is usually understood. The Tax Court, however, states that it has construed the word "home" as used in Section 23 (a) to mean "the taxpayer's place of business, employment or post or station at which he is employed", and, basing its decision upon that construction of the meaning of the word "home", the Court then concludes that a taxpayer may not have a "home" except at his place of business or employment or the post or station at which he is employed. (R. pp. 29, 30.)

We will first discuss the fundamental question of whether the statute is under any circumstances capable of the construction placed upon it by the Tax Court and then discuss each of the rules laid down by the Tax Court with respect to the construction of the statute, and, finally, the question as it is affected by the laws of the State of California.

ARGUMENT.

1. THE INTENT OF THE CONGRESS IN ITS USE OF THE WORDS "AWAY FROM HOME IN THE PURSUIT OF A TRADE OR BUSINESS".

"While the meaning to be given a word used in a Statute will be determined from the character

of its use, words in common use are to be given their natural, plain, ordinary and commonly understood meaning, in the absence of any statutory or well established technical meaning, unless it is plain from the statute that a different meaning was intended or unless such construction would defeat the manifest intention of the legislature. The words are to be interpreted with due regard to the subject matter of the statute and its purpose, and it may be necessary, in order to give effect to the legislative intent, to extend or restrict the ordinary and usual meaning of words; but the words of a statute are not to be given a forced, strained or subtle meaning.”

59 *Corpus Juris* 974, Section 577.

There is nothing in the statute itself to indicate that the Congress in passing the legislation of which Section 23 (a) is a part intended any other meaning for the word “home” than the common and ordinarily accepted meaning of that word. That meaning was well expressed by the Court of Appeals of Maryland in the following language:

“His home is the place where he and his family habitually dwell, which they leave for temporary purposes and to which they return when the occasion for absence no longer exists.”

Thompson v. Warner, 83 Md. 14, 34 Atl. 830 at page 831.

The same belief was expressed in somewhat more florid language by the Supreme Court of North Dakota in its headnote to the case of *O'Hare v. Bismarck Bank*, 45 N. D. 641, 178 N. W. 1017:

“The ‘home’ or ‘residence’ of a person is the place where he commonly resides; a place to which when absent, he returns, like a bee to its hive, a carrier pigeon to its home, and a bird to its nest.”

In a note prepared by Professor Erwin N. Griswold, of the Harvard Law School and reported at Vol. LVI, No. 7 of the Harvard Law Review for June, 1943 (and which note is printed in full in the Appendix to this brief), the learned author states:

“The statute allows the deduction of ‘All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *’. This language has been unchanged since the Revenue Act of 1918. Apparently it finds its origin in provisions which were included in the Act of August 27, 1894. The legislative history of those provisions gives clear evidence that they were intended to have broad application; and no action of Congress since that time has ever indicated a contrary intention.”

It seems apparent that had Congress intended that the word “home” should not be used in its ordinary sense, but should mean “place of business”, Congress would have used the words “place of business” and not the word “home”. Likewise if Congress had intended to provide that a person could not have a “home” at a place where he was not at that moment engaged in business, Congress would have so provided.

The Tax Court, by first construing the word “home” to mean “place of business” and by then taking the next step and concluding that Congress

did not intend to permit a man to have a "home" except where he was at that moment engaged in business has clearly destroyed the congressional mandate. It seems clear that under the construction placed upon the section by the Tax Court, no taxpayer could ever be away from his "home" on business because the place at which he is doing business and his home must be the same.

The Tax Court has, by its construction, reduced the language of Congress to an absurdity.

In its memorandum opinion, the Tax Court of the United States remarks (R. p. 31) that Mrs. Wallace was "free to make her home there (in the vicinity of Hollywood) for the duration of her employment, as we think she did". The statement that petitioner was free to make her home in Los Angeles is not true, as under the California statutes, it is the husband, not the wife, who chooses the family home and determines where it shall be. The opinion itself in the very next paragraph admits that both petitioners agreed that their domicile and residence was San Francisco and that at all times San Francisco was the "home" of both petitioners as that word is commonly used.

The word "home" is certainly in common use and has a "natural, plain, ordinary and commonly understood meaning".

To say that "home means place of business, employment, or the post or station at which he is employed" and then to follow that construction with the further qualification that a taxpayer may not keep his home or residence at a place where he is not

at that moment engaged in business is certainly to give a common word a "forced, strained and subtle meaning".

The legislative history of the provisions shows they were intended to have such broad application; the Tax Court gives them the narrowest possible meaning.

We submit that the language of the statute is plain and needs no "construction" and that the Tax Court of the United States erred in giving to the word "a forced, strained or subtle meaning" destructive of the congressional intent.

2. THE PETITIONER INA CLAIRE WALLACE HAS A PLACE OF BUSINESS AT HER HOME AND RESIDENCE IN SAN FRANCISCO.

In its memorandum opinion, the Tax Court proceeds upon the assumption, which we believe to be false, that an actor is only conducting business during that period when he or she is actually on the stage or making a motion picture. The record before us shows that both petitioners read and studied a great many plays at their residence in San Francisco during the calendar year 1939. (R. p. 27.) The record also shows that various motion pictures were offered to petitioner Ina Claire Wallace during the year 1939; that both petitioners discussed the advisability of appearing in those pictures, decided against appearing in them, and those decisions were made in San Francisco. The record also shows that the office in San Francisco was the place of business at which tele-

grams, telephone calls and mail were received during the year 1939 in respect of the petitioner Ina Claire Wallace's business as an actress. (R. pp. 82, 83, 108.)

We think the record supports the well known fact that a great deal of the time given by an actor or actress to his "business" is taken up in the reading of plays in an endeavor to find a suitable role; in discussions with the authors of those plays in an attempt to get the author to modify the play to suit the actor or actress; in the study of the role after the play has been chosen; in the determination of publicity; the acquisition of the necessary wardrobes; and the many acts and functions which finally germinate in the finished production as it appears either on the stage or on the screen. Those functions are all conducted in the actor's home and not at some spot chosen, after the event, by the Tax Court. The functions of an actor or actress are not unlike those of a lawyer. No member of any Court would suggest that a lawyer was only in business during the time he was appearing before the Court. No Court would suggest that because the petitioner, William R. Wallace, Jr., occasionally travels to other jurisdictions to try lawsuits, he establishes a new home in every community in which he tries a lawsuit. The only difference between the two professions is that the lawyer normally maintains an office in the same town as his home. The actor has his "office" at his home and performs the functions which correspond to those performed by a lawyer at his office at his home.

We now come to a discussion of the two lines of authority promulgated by the tax Court of the United

States in construing the meaning of the word "home" as used in Section 23 (a) of the Internal Revenue Code.

3. THE CHESTER D. GRIESEMER RULE.

In *Chester D. Griesemer*, 10 B.T.A. 386, the taxpayer, who was engaged in business in New York, maintained a home in Brooklyn where he supported his mother and sister. He was sent to Paris on business for his firm and such business required his staying in Paris for three years. The Board allows his Paris living expenses as a deduction, saying:

"We are convinced that the terms 'personal, living or family expenses' referred to in section 215, supra, were intended by the Congress to be applied in the ordinarily accepted sense of those words and not in the broad and sweeping sense in which the respondent is seeking to apply them. Simply because the amounts in question happen to be 'living' expenses in a strict sense does not prevent them from being deductible if they are ordinary and necessary and are shown to have been incurred in carrying on his trade or business and are clearly in addition to his living expenses at the usual place of abode which he maintains for his mother and sister. The Congress undoubtedly intended that the taxpayer's personal expenditures in maintaining his usual place of abode should not be deducted, but that all expenditures made by the taxpayer in addition to those amounts if incurred in carrying on a trade or business should be deducted in determining net income."

In *Walter F. Brown*, 13 B.T.A. 832, the *Griesemer* rule was broadened to hold that where Mr. Brown accepted a governmental appointment which required his presence and work in Washington about half the time but retained his home and professional connection in Toledo, Ohio, Mr. Brown's expenses of traveling to and from Washington and of his meals and lodging while there were deductible ordinary and necessary expenses in pursuit of his trade or business.

Following the rule so established the Board of Tax Appeals and the Commissioner of Internal Revenue have held that the following actions constituted the pursuit of a trade or business, and that therefore traveling and living expenses expended therefor were deductible:

1. The tutoring by a college professor in a city other than the city in which he maintained his home. I.T. 2481, VIII-2, C.B., p. 291 (1929).

2. The teaching by a professor at a summer school or a university other than the university regularly employing him. G.C.M. 10915, XI-2 C.B., p. 245 (1932).

3. The attendance by a member of a state legislature at the meetings thereof at a city other than his home. I.T. 3368-1940-1 C.B. 29 (1940).

4. The playing in golf tournaments by a professional golfer. G.C.M. 7133, VIII-2 C.B. 85 (1929).

5. The living in a distant city by a real estate operator for the purpose of managing and salvaging an investment. *Fred Dennett*, 7 B.T.A. 1174 (1927).

6. The traveling from Florida to California to safeguard an investment in a hotel constituting taxpayer's main source of income. *Elmore L. Potter*, 18 B.T.A. 549 (1929).

7. The living in New York for three days a week by a Boston business man in connection with corporations which he managed. *Joseph W. Powell*, 34 B.T.A. 655 (1936).

8. The living in Washington during a portion of each week by an employee of Moody's in New York, who was also employed by the S.E.C. *Donald B. McCruden*, B.T.A. Memo, Docket No. 87,806.

In G.C.M. 7133, VIII-2 C.B. 85, the General Counsel of the Bureau of Internal Revenue had this question before him in determining the right of a professional golfer to deduct his living expenses while he was away from "home". The General Counsel ruled that:

"Bouvier's Law Dictionary (Rawles Third Revision) defines business as 'that which occupies the time, attention, and labor of men for the purpose of livelihood or profit, but it is not necessary that it should be the sole occupation or employment. It embraces everything about which the person can be employed.' This definition has been followed with approval by the Supreme Court in the case of *Flint v. Stone Tracy Co.* (220 U.S. 107), the opinion noting also that 'business is a very comprehensive term and embraces everything about which a person can be employed.' * * *

The occupation of professional golf playing does not necessarily confine the player to a golf

club where he may be employed as instructor, but permits him to engage in his occupation at other places where he may receive some compensation for his activities as a golf player. In giving public exhibitions of golf playing for a consideration, and in competing at professional golf tournaments for a prize, or for money, the professional golf player is merely pursuing his occupation in another place. In many instances professional golf players are not attached as instructors or experts to any particular golf club, but gain a livelihood solely by competition in tournaments or by giving exhibitions of skillful golf playing.

Since professional golf playing constitutes a trade or business, it comes within the scope of section 23 (a) of the Revenue Act of 1928.

In Solicitor's Memorandum, 1048 (C.B. 1, 101), it was held that 'the test, therefore, is whether an expense is incurred primarily because of the business as the immediate cause inducing the expenditure'. Applying this test to the instant case, it is clear that the immediate cause of an expenditure would be the business of professional golf playing in different localities which offer inducements to the golf player to exercise his skill. * * *

Accordingly, a professional golf player traveling from his home to other places for the purpose of giving for compensation, exhibitions of golf playing or of competing in professional golf tournaments for prizes or other consideration, is entitled to deduct his ordinary and necessary traveling expenses paid or incurred while away from home in pursuit of such business. It follows that the entire amount expended for railroad fare and for meals and lodging while away from

home, in order to perform services for which compensation is received, may be deducted by a professional golf player in computing his net income. * * *"

The Board has heretofore applied what we term the *Griesemer* rule to the case of an actress. In *Adrienne Ames Cabot*, B.T.A. Memo Decision, Docket No. 90996 (1939), Miss Ames, residing at Beverly Hills, California, was under contract with Paramount studios until July, 1934, when her contract terminated. During July and August of that year she worked for thirty-one days as a free lance in a picture in New York City and then for over three months in the fall in a motion picture in London, England. Upon her income tax return she deducted her plane transportation to New York City of \$288, \$300 for her hotel expenses in New York City and \$124 for taxi services from her hotel to the studio. She also was required to entertain reporters, radio agents and others, to engage the services of maid, hairdressers, masseurs and manicurists and to pay for the cleaning of her professional wardrobe, for tips and other incidental expenses.

In 1934 she went to London to appear in a motion picture entitled "Abdul Adam". She flew from Los Angeles to New York, sailed on the *Berengeria* for England and remained there for three months to accomplish that purpose. She stopped at the Hotel Savoy for ten days at a cost of \$500 and then rented a flat for which she paid approximately \$1000 for the remainder of her stay. Her transportation expenses

were \$1244.03. In addition she was required to spend considerable sums for maids, masseurs, hairdressers and manicurists' services, presents to various persons and entertainment of writers, designers and newspaper writers.

The Board held that Miss Ames had expended at least \$3000 in ordinary and necessary business expenses in connection with the English engagement. In addition it allowed the deduction of her living expenses while in New York City. The Board held that living expenses and the other expenses of Miss Ames above described were business expenses, stating:

“The allowance of deductions such as those claimed by petitioner is based upon well established principles. The expenses must be ordinary and necessary and must bear a proper relation to the taxpayer's business with reference to time, place and purpose. Reasonable expenses made by actors and others who gain their livelihood from appearances before the public for the purpose of promoting their popularity, preserving and increasing public demand for their work, and fixing their personalities in the public mind are recognized business expenses. *William Lee Tracy*, 29 B.T.A. 75; *Blackmer v. Commissioner*, 70 Fed. (2d) 255.”

In the present case, the Board refused to apply the principles stated in the *Griesemer* case to the returns filed by the petitioners. In its opinion, the Tax Court makes no reference to the *Griesemer* case nor any of the other cases allowing the deductions under similar circumstances. In the case at bar, it is perfectly clear that the petitioner Ina Claire Wallace was, prior to

the year 1939, a resident of the City of New York. She came to California intending to return to New York as soon as she finished the job for which she was employed in Los Angeles. (R. pp. 124-125.) She did not intend to make her home in Los Angeles. At all times from and after March 16th, the date of her marriage, she not only intended to, but has, maintained her home in San Francisco. San Francisco has at all times since that date been the place at which she conducted all of her business except actual stage and screen appearances elsewhere. It is admitted that the expenses incurred in Los Angeles were in addition to the living expenses at her usual place of abode in San Francisco.

We submit that the facts bring the petitioners within the exact words of the Board of Tax Appeals in the *Griesemer* case wherein it stated the intent of the Congress in the following language:

“The Congress undoubtedly intended that the taxpayer’s personal expenditures in maintaining his usual place of abode should not be deducted, but that all expenditures made by the taxpayer in addition to those amounts if incurred in carrying on a trade or business should be deducted in determining net income.”

It is interesting to note that the Board of Tax Appeals in the *Griesemer* case has itself said with reference to part of the language of Section 23 (a) (1):

“We are convinced that the terms ‘personal, living, or family expenses’ were intended by the Congress to be applied in the ordinarily accepted sense of those words * * *.”

We ask nothing more than that the term "home" be applied in "the ordinarily accepted sense" of that word.

In the *Griesemer* case the Tax Court of the United States (under its former name of Board of Tax Appeals) did construe "home" in its usual and common sense by the use of the phrase "usual place of abode" twice within the single paragraph hereinabove quoted.

There is very little distinction between "usual place of abode" and "the place where he and his family habitually reside" (*Thompson v. Warner*, supra) or "the place where he commonly resides" (*O'Hare v. Bismarck*, supra).

We respectfully submit that the *Griesemer* rule follows the congressional mandate and should be applied to the case at bar, and the claimed deductions allowed as expenses incurred while away from home on business.

4. THE MORT L. BIXLER RULE.

In *Mort L. Bixler*, 5 B.T.A. 1181, Bixler maintained a home in Mobile, Alabama. His occupation was the managing of fairs and during 1922 he was employed at Hammond, La. Hearing that an employment opportunity existed at Houston, Texas, he went to Houston and obtained employment, after which he resigned his position at Hammond, La., and entered upon the discharge of his Houston duties. During the year in issue he made several visits to Mobile to see his family.

The Board found that Bixler was not carrying on any trade or business in Mobile, Ala., where he maintained his residence, and, in view of such finding, stated:

“Section 214 (a) (1) authorizes a deduction only of *ordinary* and necessary expenses in carrying on any trade or business, and in this classification are included salaries paid or incurred and traveling expenses, including meals and lodging while away from home in the pursuit, or carrying on, of such trade or business. In the opinion of the Board, traveling and living expenses are deductible under the provisions of this section only while the taxpayer is away from his place of business, employment, or the post or station at which he is employed, in the prosecution, conduct, and carrying on of a trade or business. A taxpayer may not keep his place of residence at a point where he is not engaged in carrying on a trade or business, as this petitioner testified was true in this instance, and take a deduction from gross income for his living expenses while away from home. We think section 214 (a) (1) intended to allow a taxpayer a deduction of traveling expenses while away from his post of duty or place of employment on duties connected with his employment. During the taxable year this petitioner was not engaged in the carrying on or pursuit of any trade or business at Mobile. A considerable portion of the expenses claimed were incurred by the petitioner in securing employment and in going from his home to such place of employment and return, and we think amounts expended in seeking employment or returning to his domicile after the termination of such employment are not deductible under the statute,

nor are the amounts expended in going from his place of employment to visit his family a proper deduction from gross income.”

Following this decision the Board consistently held that a taxpayer may not keep his residence at a point where he is not engaged in a trade or business and take deduction for his living expenses while away from such residence or deduct traveling expenses between his *place of business* and *such residence*.

Charles E. Duncan, 17 B.T.A. 1088;

George W. Lindsay, 34 B.T.A. 840;

William Lee Tracy, 39 B.T.A. 578;

Walter M. Priddy, 43 B.T.A. 18.

George W. Lindsay was a Congressman. Citing the *Bixler* case the Tax Court held that he must reside in Washington and refused to allow deductions for expenses incurred when he returned to his home in Brooklyn to consult his constituents or his hotel expenses in Washington.

Charles E. Duncan was a traveling salesman. His only “home” was a hotel room in Buffalo where he kept his ailing wife. He apparently did no business at home. The Tax Court held that he had no “home” and, therefore, no deduction.

Walter M. Priddy had a home in Wichita Falls, Texas, and was there about 25% of the time. His principal business was at Tyler, Texas, where he spent from 30% to 40% of his time. The Tax Court held Tyler to be his home and disallowed the claimed deductions for his expenses there.

Some of the cases cited under the *Bixler* rule could as well have been determined under the rule laid down under the *Griesemer* decision with the same result. As an illustration: In the case of William Lee Tracy: Tracy determined to be an actor in 1929 and left his home in Trucksville, Pa. for that purpose. During the next few years, he visited Trucksville occasionally. The case involves the calendar year 1934, and in that year he only made one fleeting airplane visit to Trucksville. The *Tracy* case construes the word "home" in its usually accepted meaning—"the usual place of abode". Obviously Trucksville was not Mr. Tracy's usual place of abode and his expenses away from Trucksville could properly disallowed under the *Griesemer* rule.

The fact is that the *Bixler* and *Griesemer* rules cannot be co-ordinated by any known process. It seems only a matter of chance, or of the relative persuasive capacities of the respective counsel, that determines which rule is to be applied.

It might at first seem that the element of time was determinative; but in the *Griesemer* case the taxpayer was away from home three years; in the *Brown* case about half the time; in the *Powell* case three days a week; yet in all these and many other cases the Tax Court has *not* said with respect to the time away from home "he cannot have a home other than at his post or station of employment".

Does the *Bixler* rule then apply only in cases where the taxpayer does *no* business at home? The *Tracy* and *Duncan* cases would seem to support this theory,

but what about Congressman Lindsay who went home to Brooklyn to consult his constituents and Mr. Priddy who apparently did some substantial amount of business at Wichita Falls? The General Counsel for the Bureau effectively destroys this theory by permitting a golf professional to deduct his traveling expenses under the *Griesemer* rule even though he has no regular place of employment. How then does he differ from the traveling salesman in the *Duncan* case?

The *Bixler* rule is a good example of what happens when the taxing authorities disregard the mandate of Congress. Congress says "you can deduct expenses while away from home on business". Clear enough. Then the taxing authorities see that some money is escaping the Treasury. So they say "but you can't have a home except where you work and your home is where you are working". So "home" becomes a "bird of passage", a fiction carried in a lawyer's brief case, a symbol in an actress' makeup box coming to rest in the dressing room of every theatre she plays in.

The simple word "home" never had such an ephemeral meaning to a Congressman or anyone else.

If the Courts sustain the tax gatherers, then once again Congress must clear away the fiction and establish the fact.

The process is well described by Professor Maguire in his "Federal Revenue—Internal or Infernal?" (1943) 21 Tax Mag. 77,123, wherein he stated:

“But we cannot forget that nearly every one of the (statutory changes) is a reversal of policy hitherto established in hard, prolonged, and elaborate battling between government and taxpayers, and the government on the whole won the battles, and that it won in the teeth of argument by the taxpayers which fully disclosed all of the considerations now impelling legislative retraction. Why so much official misjudgment as to the soundness of policy? Why this business not merely of marching up a hill and then marching down again, but of fighting and pleading to capture the hill, only to conclude that it was not a proper object of attack and that all the money, energy, and time expended on attack and defense were worse than wasted?”

(See Footnote No. 24 to Professor Griswold's article printed in the Appendix.)

Even if it be assumed that the *Bixler* rule is sound the case of the petitioners does not fall under it for the following reasons:

1. Before 1939 the petitioner Ina Claire Wallace had a home and residence in New York and intended to return there. There is no suggestion that New York was not her “home” even in the *Bixler* sense.

2. When did she lose her New York home? She was certainly away from her New York home on business when she arrived in California.

3. She worked only two weeks in Los Angeles in January of 1939 and did not work again in Los Angeles until May 1939. Most of the intervening time she was in San Francisco. She was

in San Francisco four or five weeks before her marriage on March 16th and then established her "home", residence and place of business in San Francisco. She did not return to Los Angeles until about May 1st. Between May 1st and "a few days before September 15th" (R. p. 106) she was again in San Francisco for "a few weeks". She left Los Angeles a few days before September 15th and did not return. It would seem obvious that the petitioner Ina Claire Wallace never intended to establish a home in Los Angeles. She testified that until her marriage New York was her home and thereafter San Francisco.

4. In a previous section of this brief we have pointed out that the petitioner Ina Claire Wallace's home in San Francisco was also her "office", and that there both petitioners engaged in her business. Her home was her place of business as it is of most actors.

5. In the following section of the brief, we point out that San Francisco is the home, the office, the place of business and the post or station of employment of both of the petitioners by law as well as in fact.

We respectfully submit that for all of these reasons the *Bixler* rule can have no proper application to the cases presented on these petitions.

5. THE EARNINGS OF BOTH PETITIONERS ARE COMMUNITY PROPERTY UNDER THE CONTROL AND MANAGEMENT OF THE HUSBAND: THE HOME, DOMICILE AND PLACE OF BUSINESS OF THE COMMUNITY WAS SAN FRANCISCO, CALIFORNIA.

It is admitted that the earnings of both petitioners after March 16, 1939 were community property under the laws of California. (*California Civil Code*, sections 162 and 167.) Petitioners made separate returns and included upon each one-half of the community income, and each petitioner took as a deduction one-half of the community expenses. The question at issue is whether the admitted expenses of petitioner Ina Claire Wallace, while she was in Beverly Hills, were a proper deduction from the community income.

1. Under the California law, each of the petitioners have a present, equal and existing interest in the earnings of the other.

“The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband * * *.”

Cal. Civil Code, Section 161 (a).

It will thus be seen that one-half of the community earnings of Mrs. Wallace belong to Mr. Wallace and likewise one-half of his earnings belonged immediately to her; likewise the business expenses of both petitioners being a charge against the community income are borne in equal proportions by each of the petitioners.

2. Earnings of petitioner Ina Claire Wallace as community income were under the control and management of her husband.

“The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate * * *.”

Cal. Civil Code, Section 172.

Simply stated, this section of the California Civil Code means that the business affairs of the community are under the control and management of the husband and that the moneys earned and expenses incurred are under his control, and he is the person primarily responsible therefor.

3. Under the California law, every person has one residence and only one, and the residence of the wife is the residence of the husband.

“Every person has, in law, a residence. In determining the place of residence, the following rules are to be observed:

1. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, but to which he returns in seasons of repose;

2. There can only be one residence.

5. The residence of the husband is the residence of the wife.

7. The residence can be changed only by the union of act and intent.”

Cal. Political Code, Section 52.

In 9 *Cal. Juris*, at page 837, the California rule is stated as follows:

“It is both a common law and statutory rule that the residence or domicile of the husband is the residence or domicile of the wife.”

Section 156 of the *California Civil Code* provides:

“The husband is the head of the family. He may chose any reasonable place or mode of living, and the wife must conform thereto.”

The parties hereto had agreed to maintain their home in San Francisco. There is no question but that the legal residence and the actual “home” of the petitioners after March 16, 1939 was and is in San Francisco. San Francisco is the only legal residence of the petitioners under the applicable California statutes, and it is and has been the actual residence and home of the petitioners ever since that date. There is also no doubt of the fact that one-half of the petitioner Ina Claire Wallace’s earned income belonged in law to the petitioner William R. Wallace, Jr., and that one-half of his earned income belonged to her. The business activities of both of the petitioners were community ventures. Her earnings and his earnings became part of the community income; her expenses and his expenses were chargeable to the community income. Petitioner Ina Claire Wallace’s earnings and expenses were controlled and managed by her husband, as was all of the rest of the community property.

The whole theory of the California community property law is, in effect, that the husband and wife

are engaged in what amounts to a joint venture. Each contributes according to ability. In the present case there are two taxpayers both earning a portion of the community income. The legal residence or home of both of the taxpayers is in the City and County of San Francisco. One of the taxpayers, being a lawyer, maintains an office in that city. From time to time he travels from the city in the pursuit of his profession, and his expenses, while away from home, are properly charged against the community income. The other taxpayer, being an actress, necessarily travels from city to city in the course of her professional career. There is no doubt but that the expenses in question were incurred while the taxpayer Ina Claire Wallace was away from her usual place of abode and that on the income tax returns of both taxpayers, no deduction was made for the expenses incurred in maintaining the taxpayer's usual place of abode. There is no doubt but that the taxpayers during the period in question did maintain their place of abode in the City and County of San Francisco, and that the expenses incurred in Beverly Hills were in addition to the expenses incurred in the usual place of abode.

In the case at bar, the taxpayers had residence, home and place of business in San Francisco, and it was to their San Francisco home to which all questions relating to all business were referred. San Francisco was the "usual place of abode" of both taxpayers during the taxable year and has been ever since. The location of the usual place of abode and

of all questions relating to the community income and community expenses were under the law to be controlled and determined by the husband.

5. While we believe that the expenses incurred were a proper charge against community income and therefore deductible in equal amounts from the community income of the respective taxpayers, we see no possible justification for the disallowance of the deduction upon the return of the husband taxpayer. Certainly, so far as he was concerned, the portion of the income received by him from the earnings of his wife was received by him while she was away from home engaged in a business or profession. Certainly he had no business or place of employment outside of the City of San Francisco, and certainly he maintained no "business residence" in Beverly Hills. So far as he was concerned, the expenses incurred in Beverly Hills were beyond question in addition to his usual expenses at his usual place of abode and in the place where he maintained his office and his business. None of the cases referred to by the Commissioner touch upon this point and even if we were to assume that the rule in the *Bixler* case were to be extended to its logical conclusion and the rule of the *Griesemer* case ignored, nevertheless the expenses were, as to the husband, expenses incurred away from the legal residence, the actual home and the actual place of business.

As to the husband, there would seem to be no distinction, in connection with his one-half of the community expenses, between the out of town expenses

he incurred while trying lawsuits out of the city, and those he incurred for the account of his wife while she was out of the city making a motion picture. From the wife's viewpoint, she, like he, bore her one-half of his expenses and was allowed a deduction, but neither wife nor husband are allowed a deduction for her similar expense when she was away earning community income.

CONCLUSION.

We respectfully submit that after March 16, 1939, the home of both petitioners was San Francisco and that the expenses of the community incurred in carrying on business in the City of Beverly Hills should be allowed as a deduction upon the returns of each of the petitioners, and that the decisions of the Tax Court of the United States should be reversed.

Dated, San Francisco,
November 26, 1943.

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(Appendix Follows.)

Appendix

AN ARGUMENT AGAINST THE DOCTRINE THAT DEDUCTIONS SHOULD BE NARROWLY CONSTRUED AS A MATTER OF LEGISLATIVE GRACE.—In *Gould v. Gould*,¹ one of the earliest cases under the modern income tax, Mr. Justice McReynolds wrote a passage which for many years gave great encouragement to taxpayers. He there laid down the rule that:

In the interpretation of statutes it is the established rule not to extend their provisions, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen.²

For many years this passage was calculated to put terror into a Government lawyer's heart. It was cited in more than two hundred reported decisions, and must have been set out in full in many thousands of taxpayers' briefs. Occasionally the courts added to it a reference to the decision of the House of Lords in *Partington v. Attorney-General*,³ where even stronger language was used in favor of the taxpayer.

¹245 U. S. 151 (1917).

²*Id.* at 153. For earlier expressions of the rule under prior tax laws, see *United States v. Isham*, 17 Wall. 496, 504 (U. S. 1873); *United States v. Watts*, 1 Bond 580, 583-84 (C. C. S. D. Ohio, 1865); *United States v. Wigglesworth*, 2 Story 369, 373-74 (C. C. D. Mass. 1842). Indeed, the language used in *Gould v. Gould* is very nearly a verbatim quotation from the opinion of Mr. Justice Story in the latter case.

³L. R. 4 H. L. 100, 122 (1869): " . . . if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit

But in the course of time it came to be seen that the rule of strictly literal construction of taxing statutes in favor of taxpayers was not a sound one. In *Burnet v. Gugenheim*,⁴ Mr. Justice Cordozo pointed out one of the difficulties when he refused to apply the rule of *Gould v. Gould* to the case before him, saying, "The construction that is liberal to one taxpayer may be illiberal to others". A short while later the same point was made somewhat more fully by Judge Learned Hand in his dissenting opinion in *Comm'r v. Morris*.⁵ The fact that a particular construction of a taxing statute often works in favor of one taxpayer but against another seems to require that the courts should do their best to find out what the statute means in its setting as an instrument for providing revenue. And this is true even where the two-edged effect of the construction may not be present. The real objection to the rigid rule of *Gould v. Gould* was that it represented in large part the abnegation by the courts of one of their greatest and legitimate functions, the ascertainment as near as may be of the meaning of legislative acts.

of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute." This language was cited and quoted by Mr. Justice Sutherland in *United States v. Merriam*, 263 U. S. 179, 188 (1923), and in *Crooks v. Harrelson*, 282 U. S. 55, 61 (1930).

⁴288 U. S. 280, 286 (1933).

⁵90 F.(2d) 962, 964 (C. C. A. 2d, 1937). "I cannot see that the canon of interpretation which bears against the Treasury in tax statutes should influence us; it so happens that Mr. Morris will have a deficiency to pay in this case, but it is impossible to say that either interpretation will in the end favor taxpayers; sometimes they will gain, sometimes they will not."

This was clearly pointed out by Mr. Justice Stone in *White v. United States*,⁶ in words which for all practical purposes have ended the influence of *Gould v. Gould*:

We are not impressed by the argument that, as the question here decided is doubtful, all doubts should be resolved in favor of the taxpayer. It is the function and duty of courts to resolve doubts. We know of no reason why that function should be abdicated in a tax case more than in any other where the rights of suitors turn on the construction of a statute and it is our duty to decide what that construction fairly should be.

This seems an obviously sound approach to the problem of construction of taxing statutes, and we are well rid of the thought-deadening formula of the prior cases.

Meanwhile, however, another aphorism has grown up which seems directly analogous to the rule of *Gould v. Gould*, and equally unsound. This is found in the recent decision of the Supreme Court in *Interstate Transit Lines v. Comm'r*,⁷ where the Court refers, as the keystone of its opinion, to "the now familiar rule that an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to be claimed deduction is on the taxpayer". This rule in its strict form is of very recent origin. Apparently the first expression in

⁶305 U. S. 281, 292 (1938). The final appearances of *Gould v. Gould* in Supreme Court opinions are found in *White v. Aronson*, 302 U. S. 16, 20 (1937) (per McReynolds, J.), and *Hassett v. Welch*, 303 U. S. 303, 314 (1938) (per Roberts, J.).

⁷11 U. S. L. WEEK 4490 (U. S. June 14, 1943).

terms of "legislative grace" is found in *New Colonial Ice Co. v. Helvering*.⁸ There may be some reason to think that the statement there had its roots in the group of cases involving depletion in the primitive stages of our income tax laws.⁹ For the most part, though, the earlier cases involving deductions seem to have gone no further than a statement of the burden of proof which generally lies on taxpayers.¹⁰ But the sweeping rule of the *New Colonial Ice* case

⁸292 U. S. 435, 440 (1934). "Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed." Reference may also be made to the substantially contemporaneous statement in *Helvering v. Independent Life Ins. Co.*, 292 U. S. 371, 381 (1934). "Unquestionably Congress has power to condition, limit or deny deduction from gross income in order to arrive at the net which it chooses to tax." It should be noted, though, that this is a statement bearing on the power of Congress, and that it does not deal with a question of construing what Congress has actually chosen to do.

⁹*Stratton's Independence, Ltd. v. Howbert*, 231 U. S. 399 (1913); *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503 (1917); *United States v. Biwabik Mining Co.*, 247 U. S. 116 (1918); *Goldfield Consolidated Mines Co. v. Scott*, 247 U. S. 126 (1918); *Lynch v. Alworth-Stephens Co.*, 267 U. S. 364 (1925). Cf. *United States v. Ludey*, 274 U. S. 295 (1927); *Burnet v. Thompson Oil & Gas Co.*, 283 U. S. 301 (1931). These cases have a peculiar history and would hardly seem to be a foundation for a sweeping general rule for a restrictive construction of deduction provisions. They turned on the power of Congress, not on the construction of what Congress did; and in their result they have long since been displaced by later congressional acts.

¹⁰See *Burnet v. Houston*, 283 U. S. 223, 227 (1931); *Reinecke v. Spaulding*, 280 U. S. 227, 232-33 (1930); *United States v. Anderson*, 269 U. S. 422, 443 (1926). Even this rule, it may be thought, has no application to the construction of statutes. The burden of proof relates to the proving of facts, and that is generally on the taxpayer. But there is no reason why there should be any burden one way or the other in the construction of a statute. In all cases the function of the court should be simply "to decide what that construction fairly should be." The question may indeed be close—otherwise it would probably not be in court—but it is none the less the function of the court to resolve it.

has since been frequently cited or quoted.¹¹ An indication of the potency of this approach to the construction of deduction provisions may possibly be found in the fact that the decisions in all but one of these cases went against the taxpayer.¹² Although the *New Colonial Ice* formula is a "now familiar rule", and is cited by Government lawyers in their briefs as glibly as taxpayers' lawyers once relied on *Gould v. Gould*, it has never been fully considered by the Court. Taken literally, it would mean that Congress may deny all deductions and impose a tax on gross income. This is a large question, about which there may be reasonable doubts, even today.¹³ Could Congress, for example, impose the tax on the entire proceeds from the sale of property without any allowance for the cost of the property? Could it deny all deduction for wages paid? But there is no need to resolve such questions, nor to deny that Congress has very great power over the deductions which are allowed.

¹¹*Helvering v. Taylor*, 293 U. S. 507, 514 (1935); *Helvering v. Inter-Mountain Life Ins. Co.*, 294 U. S. 686, 689-90 (1935); *White v. United States*, 305 U. S. 281, 292 (1938); *Deputy v. du Pont*, 308 U. S. 488, 493 (1940); *Helvering v. Northwest Steel Mills*, 311 U. S. 46, 49 (1940); *Helvering v. Ohio Leather Co.*, 317 U. S. 102, 106 (1942); *Interstate Transit Lines v. Comm'r*, 11 U. S. L. WEEK 4490 (U. S. June 14, 1943). Curiously enough, the passage from the *New Colonial Ice* case was quoted by Mr. Justice Stone in his opinion in *White v. United States*, 305 U. S. 281, 292 (1938), immediately following the language from the latter case which has been set out in the text, *supra* p. 1143.

¹²The exception was *Helvering v. Taylor*, 293 U. S. 507, 514 (1935), where the *New Colonial Ice* case was merely cited, and the statement of the Court was confined to the burden of proof rule, the case being one turning on the proof of facts.

¹³See MAGILL, *TAXABLE INCOME* (1936) c. 9; Note (1936) 36 COL. L. REV. 274. Cf. *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550 (1935).

The fact remains that Congress has never sought to tax gross income. We are not dealing with a question of power, but of intention. And the whole structure and the history of the income tax makes it plain that the intention of Congress to allow deductions has been just as clear as its intention to tax income.

Is not Mr. Justice Stone's approach in the *White* case just as applicable to the matter of deductions as it is to the matter of construing taxing provisions? Is there any reason to think that Congress is allowing favors or exercising "legislative grace" when it provides for deductions? Is it not "the function and duty of courts to resolve doubts" in construing deduction provisions as well as other sections of the statute; and where the issue is one of the construction of a statute "to decide what that construction fairly should be"? A great service was done in the *White* case when it was shown that the problem of construing tax statutes was one of finding the meaning of words, and that this was a problem which must be approached free from any rules or presumptions or other barriers to the ascertainment of the thought which Congress has expressed. But no reason is perceived why exactly the same rule should not be applied to the construction of a deduction provision. The problem is to find the meaning of what Congress has said. There is no reason why that should be approached in terms of "legislative grace" or of "clear" burden on the taxpayer.

There would seem to be room to think that the approach exemplified by the passage from the *New*

Colonial Ice case has already resulted in considerable distortion of our income tax law. Much of the controversy has revolved around the matter of deductions for business expenses. The statute allows the deduction of "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . ."¹⁴ This language has been unchanged since the Revenue Act of 1918.¹⁵ Apparently it finds its origin in provisions which were included in the Act of August 27, 1894.¹⁶ The legislative history of those provisions gives clear evidence that they were intended to have broad application;¹⁷ and no action of Congress since that time has ever indicated a contrary intention. There would seem to be every reason why the words of the statute should be given a broad construction so as to achieve the obvious purpose of Congress to tax net business income. It is true that the expenses must be "ordinary

¹⁴INT. REV. CODE § 23(a)(1)(A).

¹⁵Section 214 (a)(1) (relating to individuals); § 234(a)(1) (relating to corporation). In §§ 5(a) and 12(a) of the Revenue Act of 1916, the wording was very slightly different, but the legislative history of the 1918 Act does not show that any change of meaning was intended.

¹⁶28 STAT. 509 (1894). Section 28 of this Act provided in the case of individuals that "the necessary expenses actually incurred in carrying on any business, occupation or profession shall be deducted." *Id.* at 553. And § 32 imposed the tax on corporations "on the net profits or income above actual operating or business expenses." *Id.* at 556.

¹⁷Senator Vest of Missouri, in charge of the bill, stated that the word "business" was inserted in addition to the word "operating" expenses, "out of abundance of caution," and so that the deduction "would clearly cover all the legitimate expenses attending the business." 26 CONG. REC. 6887 (1894). And Mr. Vest repeatedly asserted that the language of the bill was broad enough to cover various expenditures suggested by other Senators. See 26 CONG. REC. 6888, 7131, 7133 (1894).

and necessary", but these words are given full and adequate function when they are used to separate capital expenditures from current expenses, on the one hand, and when they eliminate such things as illegal expenditures or wholly unrelated expenses,¹⁸ on the other. But the Court, by bearing down on "ordinary and necessary", and on "trade or business", and reducing these phrases to sterile bones, has done much to thwart the purpose of Congress to impose the tax on net incomes.

In *Deputy v. Du Pont*,¹⁹ a deduction was disallowed for an expenditure which had clearly been made by the taxpayer in connection with his business activities. The denial was based on a narrow construction of what constituted the taxpayer's "trade or business", although the court conceded that "There is no intimation in the record that the transactions . . . were entered into for any reason except a *bona fide* business purpose".²⁰ And then for good measure they were held not to be "ordinary and necessary" as well, in terms which would eliminate nearly all but routine expenses. It would seem, though, that the word "ordinary" in the statute was designed to eliminate expenditures which should be capitalized, and that it should take a clearer indication than that in the statute to lead to the conclusion that Congress intended

¹⁸See Mr. Justice Jackson, dissenting in *Interstate Transit Lines v. Comm'r*, 11 U. S. L. WEEK 4490 (U. S. June 14, 1943). "Of course the Commissioner is not obliged to allow this, or any other arrangement, when it is used as a cover for tax skullduggery."

¹⁹308 U. S. 488 (1940).

²⁰*Id.* at 493.

to disallow legitimate business expenses. And now the same approach is applied in the *Interstate Transit Lines* case²¹ to disallow the deduction of an expense which was unquestionably legitimate and had the clearest business purpose. A bus company, in order to comply with state law, organized a subsidiary to conduct its operations in California. It agreed with the subsidiary to make good any deficit which the subsidiary might incur. The deduction of a payment so made was disallowed on the ground that it was not an expense of the parent's business since it was the subsidiary which carried on business in California. The dissenting opinion of Mr. Justice Jackson²² will seem persuasive to many. Here was an undeniably legitimate expense incurred in business. Considering the obvious purpose of Congress to tax net income is there any reason to suppose that Congress intended that such a deduction be denied? Does it not seem likely that another result might have been reached if the question had been approached in terms of what the taxing statutes "fairly" mean instead of on the basis of "legislative grace" and a "clear" burden on the taxpayer?

Every reason which opposed the rule of *Gould v. Gould* seems equally applicable to the construction of deductions. In neither case should there be any presumption or any burden. In both cases the function of the Court should be to find as best it can what the

²¹*Interstate Transit Lines v. Comm'r*, 11 U. S. L. WEEK 4490 (U. S. June 14, 1943).

²²Concurred in by Mr. Chief Justice Stone and Mr. Justice Murphy.

statute "fairly" means. And in this process, there is no more reason to suppose that the meaning of a deduction provision should be narrow than that it should be unduly broad.²³ The fundamental fact is that Congress has given every indication that what it intends to tax is net income; and a construction which leads in substance to a tax on gross income is just as inconsistent with the statute as one which allows to taxpayer to receive income free from tax.

A final point may be in order. It is sometimes hard to see why the Treasury and the Department of Justice allow a case like the *Interstate Transit* case to get to the Supreme Court, or make there the argument which has now been sustained. Time and again, in the past few years, the Government has taken cases to the Supreme Court and won them, only to have to go to Congress to get the law changed in accordance with the original contentions of taxpayers.²⁴ Indeed,

²³There is ample precedent for such an approach, in addition to its clear statement in *White v. United States*, 305 U. S. 281, 292 (1938). In *Smythe v. Fiske*, 23 Wall. 374, 380 (U. S. 1874), involving a customs statute, the Court said: "A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law." More recently, the Court has referred to a question of deduction as "purely one of statutory construction." *Burnet v. Thompson Oil & Gas Co.*, 283 U. S. 301, 304 (1931). In *Ilfeld Co. v. Hernandez*, 292 U. S. 62, 66 (1934), a deduction was said to depend on a statute that "fairly may be read to authorize it."

²⁴See Maguire, *Federal Revenue—Internal or Infernal?* (1943) 21 TAX MAG. 77, 123: "But we cannot forget that nearly every one of the [statutory changes] is a reversal of policy hitherto established in hard, prolonged, and elaborate battling between government and taxpayers, that the government on the whole won the battles, and that it won in the teeth of argument by the taxpayers which fully disclosed all of the considerations now impelling legislative retraction. Why so much official misjudgment

the very rule of *Deputy v. du Pont* has now been at least partially overruled by statute.²⁵ Should it be necessary to seek specific Congressional authorization for such a deduction as that involved in the *Interstate Transit* case?²⁶ Might it not have been sound administration to allow a legitimate business to deduct an expense which naturally arose in the conduct of its business? The matter of a fair allowance of deductions becomes of crucial importance with tax rates at their present level, and it is as much to the interest of the Government as it is of taxpayers to see that taxes are not imposed on what is not in any fair sense net income of the taxpayer. The whole job should not be thrown back onto the draftsmen of the statutes. Their task can be greatly simplified to the benefit of us all by a more sympathetic and organic approach to the problems of construing tax statutes.

E. N. G.

as to the soundness of policy? Why this business not merely marching up a hill and then marching down again, but of fighting and bleeding to capture the hill, only to conclude that it was not a proper object of attack and that all the money, energy, and time expended on attack and defense were worse than wasted?"

²⁵INT. REV. CODE § 23(a)(2), added by § 121 of the Revenue Act of 1942.

²⁶See Mr. Justice Jackson in *Helvering v. Griffiths*, 63 Sup. Ct. 636, 653 (March 1, 1943). "Why should we be asked to impose by interpretation a tax which the Treasury intends to ask Congress to lift?"

Nos. 10547 and 10548

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

WILLIAM R. WALLACE, JR., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

INA CLAIRE WALLACE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES**

BRIEF FOR THE RESPONDENT

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FILED

JAN 6 - 1944

PAUL P. GIBBEN,
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BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum opinion of the Tax Court (R. 25-32) is not reported.

JURISDICTION

These petitions for review (R. 34-38) involve federal income taxes of William R. Wallace, Jr., and Ina Claire Wallace, his wife, for the taxable year 1939.

On December 17, 1941, the Commissioner of Internal Revenue mailed to the taxpayers notices of deficiency in the amounts of \$558.41 and \$503.41, respectively. (R. 7-11, 18-22.) Within ninety days thereafter and on March 11, 1942, the taxpayers filed petitions with the Board of Tax Appeals (now the Tax Court) for a redetermination of the deficiencies under the provisions of Section 272 of the Internal Revenue Code. (R. 2-11, 13-22.) The decisions of the Tax Court sustaining the deficiencies were entered May 7, 1943. (R. 32-33.) The cases are brought to this Court by petitions for review filed August 4, 1943 (R. 34-38), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.¹

QUESTION PRESENTED

Whether taxpayers, a husband and wife domiciled in San Francisco, California, are entitled under Section 23 (a) (1) of the Internal Revenue Code to deduct as traveling expenses "while away from home" amounts expended by the wife for food, rent and similar living expenses at Hollywood, California, while she was employed there during 1939 as a motion picture actress.

STATUTE AND REGULATIONS INVOLVED

These appear in the Appendix, *infra*, pp. 22-23.

¹ The income tax returns were filed on the community property basis. (R. 28, 67-100.) The separate proceedings were consolidated for hearing below (R. 25), and have also been consolidated here for hearing upon a single printed record (R. 129-132).

STATEMENT

The facts as found by the Tax Court (R. 25-28, 31) may be summarized as follows:

Taxpayer, Ina Claire Wallace, known professionally by her maiden name of Ina Claire, is a well known stage and screen actress. From about August, 1932 to April, 1936 she lived in Connecticut, and from April, 1936 to November, 1938 she lived at the Pierre Hotel in New York City and also leased an apartment in that city. Throughout these years most of her working time was devoted to the legitimate stage. (R. 26-27, 114-119.)

In November, 1938 she entered into a contract with Loew's, Inc., which provided for her services as a film actress for 34 weeks over a 40-weeks period beginning November 22, 1938, and ending September 30, 1939, at a salary of \$2,000 per week. The contract required her to remain in the vicinity of Hollywood, California, throughout the 40-week period so as to be available for duty at any and all times. (R. 26, 50, 61, 112.) During 1939 and while in Hollywood to carry out this employment, she lived at the Beverly Wilshire Hotel for a few weeks and then rented a house for a period of three months. At the expiration of that period she rented another house which she occupied until September 15, 1939. (R. 28, 110, 119, 124.)

During the period of her employment by Loew's, Inc., and on March 16, 1939, Ina Claire married the taxpayer, William R. Wallace, Jr., an attorney who lived in San Francisco, California, and who had been practicing law there since 1927. They were married in Salt Lake City, Utah, and after the honeymoon

returned to the home of Mr. Wallace in San Francisco, where they stayed for a month or six weeks. They discussed the matter of their future residence at that time and agreed to make their permanent home in San Francisco. About May 1, 1939, Mrs. Wallace returned to Hollywood to resume her work at the studio, and she remained in Hollywood until the termination of her contract with Loew's Inc. (R. 26-27, 108, 122.)

Upon completing her employment in Hollywood, and about September 15, 1939, Ina Claire Wallace joined her husband in San Francisco. She remained at his home for the balance of the taxable year and during that time, with his advice and assistance, reviewed many plays submitted for her approval. She appeared in a play during the summer of the following year, and in another play in New York City during the spring of 1941. She then returned to San Francisco and, except for occasional trips, has since lived there. (R. 27-28, 106-107, 113.)

During the period that she was employed in Hollywood, namely, from November, 1938 through September, 1939, Ina Claire Wallace was not traveling in pursuit of a trade or business. Throughout this period Hollywood was her place of business and her "home" within the meaning of the taxing statute, although after her marriage on March 16, 1939 her domicile became that of her husband. (R. 31.)

Taxpayers filed separate income tax returns for the year 1939 on the community property basis. Each reported one-half of their combined community income and claimed deductions of one-half of their

combined community expenses for the period after March 16, 1939, the date of marriage. (R. 28, 87-100.) The expenses so claimed in each return included one-half of the "Business expenses" of Ina Claire Wallace totaling \$15,462.31, of which \$4,630.33 represented "Household expenses in Los Angeles." (R. 91, 97.) These household expenses consisted of rent, food and similar living expenses of Ina Claire Wallace after her marriage but while she was still employed and staying at Hollywood. (R. 28.)

The Commissioner disallowed these household living expenses as not being within the deductions allowed by Section 23 (a) (1) of the Internal Revenue Code. (R. 9-10, 20-21, 28.) The Tax Court affirmed the Commissioner's determination. (R. 32-33.)

SUMMARY OF ARGUMENT

Deductions for personal, living or family expenses are expressly prohibited by Section 24 (a) (1) of the Internal Revenue Code. Amounts spent for meals, lodging and the like are deductible as ordinary and necessary business expenses under Section 23 (a) (1) only if they are traveling expenses "while away from home" in the pursuit of a trade or business. It is settled that the place where a taxpayer has his "home" as that term is used in the taxing statute, is a question of fact depending upon where he is regularly or principally employed or carries on his business during the taxable year. The Tax Court found that, during the entire period for which the living expenses in question were incurred, taxpayer Ina Claire Wallace was engaged in carrying on the business of motion picture

actress at Hollywood, California, and that therefore she was not traveling away from her statutory home during that period. Since the terms of her employment contract as well as the other evidence amply support this finding, it is conclusive on appeal.

The Tax Court properly held that Section 23 (a) (1) is not concerned with legal residence or marital domicile. It correctly sustained the Commissioner's determination that, for tax purposes, the statutory home of taxpayer Ina Claire Wallace was Hollywood, where she was engaged in carrying on her business and earning her livelihood even though the marital domicile and her husband's place of business were elsewhere. The plain purpose of the provision of Section 23 (a) (1) permitting the deduction of expenditures for meals and lodging while traveling away from home in the pursuit of a trade or business, read in conjunction with Section 24 (a) (1) prohibiting any deduction for personal or living expenses, is to extend relief to a taxpayer who continues to maintain a home where he is regularly employed or engaged in business but is required to travel away from that home temporarily on business.

ARGUMENT

The tax court correctly sustained the Commissioner's determination that taxpayers were not entitled under Section 23 (a) (1) of the Internal Revenue Code to deduct as ordinary and necessary business expenses the amounts expended by taxpayer Ina Claire Wallace in 1939 for living at Hollywood, California, where she was carrying on her business, even though her domicile was elsewhere

The taxpayers, husband and wife, seek a review of the decision of the Tax Court which sustained the

Commissioner's disallowance of deductions consisting of the living expenses of the wife, Ina Claire Wallace, while she was employed in Hollywood in 1939 as a film actress and while her domicile was that of her husband elsewhere. Taxpayers filed separate income tax returns on the community property basis and each deducted one-half of that portion of the wife's Hollywood living expenses which was incurred after the marriage on March 16, 1939.

Taxpayers' claim must be sustained, if at all, under Section 23 (a) (1) of the Internal Revenue Code, relating to deductions for ordinary and necessary business expenses (Appendix, *infra*). That section provides for the allowance of "traveling expenses (including the entire amount expended for meals and lodging) *while away from home* in the pursuit of a trade or business." (Italics supplied.) This provision must be applied in conjunction with Section 24 (a), which specifies that "in computing net income no deduction shall in any case be allowed in respect of (1) personal, living, or family expenses" (Appendix, *infra*).

The Tax Court, affirming the Commissioner's determination, held substantially that determinative of whether taxpayers are entitled to the deductions claimed is the meaning of the term "home" in Section 23 (a) (1), and that as used in that section "home" is where the taxpayer has his principal place of business or employment. This holding is in conformity with a long line of decisions. *Coburn v. Commissioner* (C. C. A. 2d), decided November 29,

1943 (1943 C. C. H., par. 9652); *Duncan v. Commissioner*, 17 B. T. A. 1088, affirmed, *per curiam*, 47 F. 2d 1082 (C. C. A. 2d); *Priddy v. Commissioner*, 43 B. T. A. 18, petition for review dismissed July 23, 1941 (C. C. A. 5th); *Tracy v. Commissioner*, 39 B. T. A. 578; *Lindsay v. Commissioner*, 34 B. T. A. 840; *Peters v. Commissioner*, 19 B. T. A. 991; *Bixler v. Commissioner*, 5 B. T. A. 1181. In the recent case of *Coburn v. Commissioner*, *supra*, the facts of which are discussed below, the Circuit Court of Appeals for the Second Circuit held that a taxpayer's home, as that term is used in Section 23 (a) (1), is limited to "the place where he is regularly employed or customarily carries on business during the taxable year".

In *Tracy v. Commissioner*, *supra*, the taxpayer, a stage and screen actor, was domiciled and had his permanent family home in Pennsylvania, where he maintained his mother and a niece. This home was his permanent address where important mail was sent and where he kept many of his personal effects. Since 1919 he had been engaged in the theatrical business, either as an actor on the legitimate stage or in motion pictures. During 1934, the taxable year involved, the taxpayer was employed in Los Angeles making motion pictures, and while there resided in hotels and furnished apartments. He claimed deduction of his living expenses in Los Angeles on the ground that while in California in pursuit of his profession he was traveling away from his home. It was held that the taxpayer's home during the taxable year was California, and that the expenses were personal living expenses and not deductible.

In *Priddy v. Commissioner, supra*, the taxpayer maintained a permanent home for his family at Wichita Falls, Texas, but his business required him to be away from there about 75 percent of the time and to maintain living quarters 245 miles away in Tyler, Texas, where he spent 30 to 40 percent of his time. It was held that the taxpayer could not deduct his living expenses at Tyler because that was his "principal" place of business and therefore his statutory home.

Lindsay v. Commissioner, supra, involved the Washington hotel expenses of a Congressman while attending sessions of Congress and his railroad fares to and from New York, where he maintained a residence, to confer with his constituents. These expenses were held not deductible because Washington, the seat of the Government, was the taxpayer's "home" within the meaning of the statute.

In *Duncan v. Commissioner, supra*, the court held that a salesman who traveled on a roving commission and who maintained his living quarters wherever he happened to be had no usual place of business and statutory home, and therefore could not deduct the year's expenses for meals and lodging.

The construction of "home" upon which these decisions rest is in harmony with the administrative interpretation of the applicable statute here involved, as well as of like prior statutes,² beginning with the

² Sections 214 (a) (1) and 215 (a) (1) of the Revenue Acts of 1921, 1924 and 1926; Sections 23 (a) and 24 (a) (1) of the Revenue Acts of 1928, 1932, 1934, 1936 and 1938; Section 121 (a) (1) (A) of the Revenue Act of 1942.

Revenue Act of 1921. O. D. 905, 4 Cum. Bull. 212 (1921); O. D. 1021, 5 Cum. Bull. 174 (1921); I. T. 1264, I-1 Cum. Bull. 122 (1922); I. T. 1355, I-1 Cum. Bull. 194 (1922); I. T. 3314, 1939-2 Cum. Bull. 152. Under accepted principles, the re-enactment of like sections in the successive Revenue Acts since 1921 is an implied legislative recognition and approval of the administrative interpretation. *Helvering v. Winmill*, 305 U. S. 79; *National Lead Co. v. United States*, 252 U. S. 140; *Hecht v. Malley*, 265 U. S. 144.³

The place where a taxpayer is regularly employed and therefore has his statutory home during the taxable year is, of course, a question of fact in each case. *Coburn v. Commissioner*, *supra*; *Priddy v. Commissioner*, *supra*; *Duncan v. Commissioner*, *supra*. The evidence clearly supports the Tax Court's finding that during the period in question the regular and principal place of employment of Ina Claire Wallace was Hollywood. Prior to November, 1938 she had been both a stage and screen actress, and since 1929 had lived successively in California, Connecticut and New York (R. 26, 114-119). The contract with Loew's, Inc. (R. 46-

³ The established rule that commuters' fares are not business expenses deductible under Section 23 (a) (1) likewise rests upon the principle that the taxpayer's statutory home is his regular place of business or employment and that expenses of traveling to and from such place are not incurred "while away from home". Section 19.23 (a)-2 of Treasury Regulations 103; Article 23 (a)-2 of Treasury Regulations 101, 94, 86; Article 122 of Treasury Regulations 77 and 74; Article 102 of Treasury Regulations 69 and 65; Article 101 (a) of Treasury Regulations 62; *Lindsay v. Commissioner*, *supra*; *Priddy v. Commissioner*, *supra*; *Bixler v. Commissioner*, *supra*.

78), pursuant to which she came to Hollywood in November, 1938, ran for 40 weeks and expired September 30, 1939 (R. 50, 120), and required her to be available at all times at Los Angeles to perform services as a motion picture actress (R. 26, 61, 112). She was obliged to act in up to five pictures a year (R. 72), and was paid by the week (R. 51, 121). The contract granted to Loew's separate options to extend the term of her employment at increasing rates of compensation for four consecutive "picture years" (October 1 to September 30) beginning October 1, 1939, subject to a right of election in Ina Claire Wallace at the end of any picture year to take an "intervening stage year" as a "lay-off" from her film work; and in case she elected to take an intervening stage year and did not find a stage role within 90 days Loew's had the right to recall her services as a film actress. (Pet. Ex. 1, pars. 16, 23, 25, 27, 30; at R. 61-62, 66-68, 69-70, 72, 73.) To carry out this employment she gave up her New York hotel accommodations, did not renew the lease of her New York apartment, and came to Beverly Hills to live. (R. 114-117, 120-121.) After staying at a hotel for a few weeks, she rented a house for three months, and then rented another house for the period March 15, 1939 to September 15, 1939. (R. 28, 110, 119, 124.) At the expiration of this lease, which coincided with the termination of her services under the contract with Loew's, she did not return to her New York activities but went to San Francisco to live and remained there for the balance of the taxable year. (R. 27, 106-107, 113.) At the hearing below it was

stipulated that the deductions in question consisted of the personal living expenses of Ina Claire Wallace incurred at Beverly Hills during the period from March 16, 1939 (the date of marriage), to September 15, 1939, and that during all of such period she was employed in Hollywood by Loew's, Inc. (R. 112-113.) In the income tax returns these personal living expenses were labeled "Household expenses in Los Angeles." (R. 91, 97.) On the basis of these facts the Tax Court found (R. 31) that Hollywood was the place of business of Ina Claire Wallace and therefore her statutory home during the period the living expenses in question were incurred, and that accordingly she was not traveling in pursuit of a trade or business during that time. This finding is amply supported by the record, and it is elementary that a finding of fact by the Tax Court based upon substantial evidence will not be disturbed on appeal. *Wilmington Co. v. Commissioner*, 316 U. S. 164; *Helvering v. Rankin*, 295 U. S. 123; *Phillips v. Commissioner*, 283 U. S. 589; *Botany Mills v. United States*, 278 U. S. 282.

It is apparent that the facts here are materially different from those in *Coburn v. Commissioner*, *supra*, and that the decision below is not in conflict with the opinion in that case. The court there affirmed the principle that home for tax purposes is "the place where the taxpayer is regularly employed or customarily carries on business during the taxable year". On the particular facts there presented, however, the court found that the taxpayer did not cease to be regularly employed in New York by going to Cali-

formia to fulfil a short-term contract with the expectation of returning to New York within a few weeks. The court specifically pointed out that the taxpayer had maintained an apartment in New York since 1900, had all his life followed the career of actor-manager on the legitimate stage in New York, and had never before acted in pictures; that he went to California in 1937 to fulfil a short-term contract with the expectation of shortly returning to New York and that "by chance he got five short-term contracts" which kept him over until 1938; that he continued to maintain his New York apartment throughout the taxable year and in between his limited California engagements returned to New York for several months during the year to resume his regular work there; and that when these engagements were over he immediately returned to New York and continued his activities there for the remainder of the year. Under these circumstances, the court held that "each of his limited engagements in California was only a temporary diversion from his life-long career on the legitimate stage".

In contrast with the facts in the *Coburn* case, the record here shows that taxpayer Ina Claire Wallace was exclusively a film actress during the entire period for which the living expenses in question were incurred, and that her employment in Hollywood was not a "temporary diversion" from a career and an established home elsewhere. She had been a screen actress and had resided in California before, gave up her New York apartment after coming to Hollywood, and did not return to New York at any time during

the taxable year. The contract pursuant to which she came to Hollywood was not a "short-term" engagement as in the *Coburn* case but was for practically an entire picture year; it required her continuous presence in Los Angeles for 40 weeks and provided for weekly compensation. She obviously did not come to Hollywood with the expectation of shortly returning to New York and by chance receive additional short-term contracts, as did the taxpayer in the *Coburn* case, but made her business during the period in question exclusively that of film acting. The options granted to Loew's to extend the term of her employment for successive years are significant as showing an intention to make motion picture acting in Hollywood her primary occupation during 1939. In the light of this record it is submitted that the finding of the Tax Court that Hollywood was her regular place of business during the taxable year is not only supported by substantial evidence, but is the only finding which could reasonably have been reached.

In an attempt to establish that Ina Claire Wallace had her place of business and therefore her statutory home at Mr. Wallace's residence in San Francisco, taxpayers contend (Br. 11-13) that during 1939 she reviewed many plays and received mail and telephone messages there. Apart from the question whether her husband's residence became her place of business by virtue of such activities, the argument fails to take account of the important fact, as found by the Tax Court (R. 27-28), that these activities occurred *after* the termination of her employment and residence in

Hollywood. The living expenses claimed as a deduction are for the preceding portion of 1939 during her employment in Hollywood (R. 25-26), and these prior Hollywood living expenses manifestly could not have been incurred in traveling away from a San Francisco place of business and "home" when that home had not yet been acquired. In permitting deductions for traveling expenses "while away from home" the statute patently has reference to an existing home. The conclusion seems inescapable that only Hollywood could have been the regular place of business and statutory home of Ina Claire Wallace during the entire period from November, 1938 to September, 1939 that her contract required her presence there, since she gave up her New York activities and apartment, carried on her business and maintained her living quarters in Hollywood throughout this period, and did not go to San Francisco to live until her Hollywood employment was over.⁴

While it is true that by virtue of her marriage, during the course of her employment in Hollywood, Ina Claire Wallace acquired the domicile of her husband, she did not thereby acquire a new home in the tax sense. Taxpayers' suggestion (Br. 7-10, 29) that "home" as used in Section 23 (a) (1) is synonymous with legal residence or domicile finds no support in the statute, the decisions, or the administrative interpreta-

⁴ Despite taxpayers' contention that Hollywood never became the statutory home of Ina Claire Wallace, her Hollywood living expenses for that portion of 1939 preceding the marriage were not claimed as a deduction. Taxpayers assert that the failure to do so was a mistake. (R. 86.)

tions. Moreover, since under the authorities the maintenance of an actual residence at a place other than the taxpayers' regular place of business would not warrant the deduction of living expenses at such place of business, it would seem abundantly clear that the establishment or maintenance of a legal residence elsewhere cannot warrant such deduction. The plain purpose of the provision in Section 23 (a) (1) permitting the deduction of expenditures for meals and lodging while traveling "away from home" in pursuit of a trade or business, read in conjunction with Section 24 (a) (1) prohibiting any deduction in any case for personal or living expenses, is to extend relief to a taxpayer who maintains a home where he regularly carries on his business or employment and is required to travel away from that home on business without reimbursement for the cost of traveling.⁵ There is no basis in the language of the statute or elsewhere for concluding that the legislative intent was to place a premium on the establishment or maintenance of a legal residence or domicile at a place other than where the taxpayer is regularly employed, or of another actual residence, by sanctioning the deduction of what are in fact personal living expenses under the guise of traveling expenses. To so conclude would permit easy

⁵ Whether Ina Claire Wallace was required to travel away from Los Angeles on business does not appear. The contract with Loew's, Inc., provided, however, that if her services were needed "on location", i. e., away from Los Angeles, all her necessary meals, lodging and transportation would be furnished by Loew's (R. 60-61), and the deductions here claimed consist entirely of her household living expenses in Hollywood.

circumvention of the statute and would render meaningless the plain language of Section 24 (a) (1) inhibiting deductions for "personal, living, or family expenses."⁶

In contending (Br. 9-11) that under the meaning of home adopted by the Tax Court no taxpayer could ever be away from his home on business because his home will always be where he is "at that moment" engaged in business, taxpayers misconceive the applicable principle upon which the decisions rest. This principle is that home for tax purposes is where the taxpayer is regularly or principally engaged in business during the taxable year, and that he is entitled to deduct his living expenses only while traveling away from that home on business. Since the place where a taxpayer is regularly engaged in business is necessarily a question of fact in each case, the application of this principle to different sets of fact

⁶ The construction urged by taxpayers also appears impracticable, since domicile ordinarily has reference to the states or political subdivisions rather than to physical places within their boundaries (cf. Restatement of the Conflict of Laws, Sections 9, 11, 28). If "home" for tax purposes meant "domicile", traveling expenses incurred anywhere within the state of domicile would not be allowable under any circumstances while, on the other hand, a taxpayer employed at a point in state A within easy commuting distance of his living quarters in state B would be entitled to deduct all his fares and living expenses as traveling expenses "while away from home", results manifestly not intended by Sections 23 (a) (1) and 24 (a) (1). Thus, even on taxpayers' assumption that home means domicile, it might well be contended that the living expenses of Ina Claire Wallace here involved were not incurred away from home because California was both her domicile and where the expenses were incurred.

will, of course, sometimes be difficult and may lead to different results. This does not mean, however, that there has been evolved a conflicting “*Griesemer rule*” and “*Bixler rule*”, as taxpayers suggest. (Br. 13, 20.) Thus in *Cabot v. Commissioner*, unreported B. T. A. decision of March 29, 1939, to which taxpayers refer (Br. 17-18) as having been decided under the “*Griesemer rule*”, the Board of Tax Appeals relied upon the *Tracy* case, which taxpayers have cited (Br. 22) as illustrative of the “*Bixler rule*”. And in the *Duncan* case, *supra*, where the court affirmed the holding of the Board denying deduction of living expenses to a traveling salesman, the Board in its opinion relied upon and quoted from the opinions in both the *Bixler* and the *Griesemer* cases. In any event, while we believe that the Board decisions and the Bureau of Internal Revenue rulings cited by taxpayers as applications of what they term the “*Griesemer rule*” are distinguishable on their own peculiar facts,⁷ we do not believe any useful purpose would be served in discussing the facts in each case and ruling. It need only be pointed out that in none of them is there any intimation that “home” for tax purposes is synonymous with legal residence or domicile, that the Circuit Court of Appeals in the *Coburn* case recently affirmed the principle that it means the taxpayers’ place of regular em-

⁷ In the decisions cited it appears that the taxpayer continued to maintain permanent living quarters at a regular place of business or employment while working temporarily at another place, which was not the case here.

ployment or business, and that the record here fully supports the finding below.

Nor do the community property laws of California upon which taxpayers rely (Br. 27-32) have any relevancy to a determination of what expenditures are properly allowable as traveling expenses under Section 23 (a) (1) of the Internal Revenue Code. As the Tax Court pointed out (R. 31-32), we are not here concerned with what constitutes community income or community expenses; the Commissioner has raised no question as to the marital domicile of taxpayers, or their right to treat combined earnings after marriage as community income and to deduct in computing community income any amounts properly allowable under the revenue laws. The only question here presented is whether living expenses of the wife claimed by taxpayers in equal shares as a deduction from their community income are properly allowable (see *Herder v. Helvering*, 106 F. 2d 153 (App. D. C.), certiorari denied, 308 U. S. 617; *Stewart v. Commissioner*, 95 F. 2d 821 (C. C. A. 5th)), and the determination of that question depends solely on where the wife maintained her "home" as that term is used in the federal taxing statute. While the earnings of taxpayers are concededly community property, they are separate taxpayers and file separate returns. It cannot seriously be contended that a wife engaged in earning her own livelihood may not, for tax purposes at least, have a home separate from that of her husband, and that consequently if she engages in business or accepts regular employment in another

city all her living expenses there become deductible as traveling expenses. Furthermore, the revenue laws are to be construed in the light of their general purpose to establish a nationwide scheme of taxation uniform in its application, and hence their provisions are not to be taken as subject to state control or limitation unless the language or necessary implication of the section involved makes its application depend on state law. *Commissioner v. Greene*, 119 F. 2d 383 (C. C. A. 9th), certiorari denied, 314 U. S. 641; *United States v. Pelzer*, 312 U. S. 399. There is nothing in Section 23 (a) (1) or 24 (a) (1) or in any other portion of the Act to warrant any inference that, for purposes of ascertaining what are allowable deductions for traveling expenses away from home, the meaning of "home" is to depend upon local law definition, upon the *situs* of the marital domicile, or upon whether earnings of a husband and wife are community property. On the contrary, in the light of the familiar principle that deductions in general are a matter of legislative grace (*White v. United States*, 305 U. S. 281; *New Colonial Co. v. Helvering* 292 U. S. 435), and particularly in the light of the clear expression of Congressional intent in Section 24 (a) (1) to prohibit deductions "in any case" for personal, living, or family expenses, it is submitted that the Tax Court could have followed no other course than to adhere to the established rule that home for tax purposes is where the taxpayer is regularly employed or engaged in business during the taxable year.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted.

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DECEMBER, 1943.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses.*—

(1) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * * *

(26 U. S. C. 1940 ed., Sec. 23)

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses;

* * * * *

(26 U. S. C. 1940 ed., Sec. 24)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.23 (a)—1. *Business expenses.*—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, * * * Among the items included in business expenses are management expenses, commissions, labor, supplies incidental repairs, operating expenses of

automobiles used in the trade or business, traveling expenses while away from home solely in the pursuit of a trade or business (see Section 19.23 (a)-2), advertising and other selling expenses, together with insurance premiums against fire, storm, theft, accident, or other similar losses in the case of a business, and rental for the use of business property. * * *

SEC. 19.23 (a)-2. *Traveling expenses*.—Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals, and lodging, are business expenses.

(a) If, then, an individual, whose business requires him to travel, receives a salary as full compensation for his services, without reimbursement for traveling expenses, or is employed on a commission basis with no expense allowance, his traveling expenses, including the entire amount expended for meals and lodging, are deductible from gross income.

* * * *

SEC. 19.24-1. *Personal and family expenses*.—Insurance paid on a dwelling owned and occupied by a taxpayer is a personal expense and not deductible. Premiums paid for life insurance by the insured are not deductible. In the case of a professional man who rents a property for residential purposes, but incidentally receives clients, patients, or callers there in connection with his professional work (his place of business being elsewhere), no part of the rent is deductible as a business expense. If, however, he uses part of the house for his office, such portion of the rent as is properly attributable to such office is deductible. * * *

Nos. 10,547 - 10,548

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

17

WILLIAM R. WALLACE, JR.,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

(CONSOLIDATED
CASES)

INA CLAIRE WALLACE,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

Before proceeding to a discussion of the argument and of the authorities cited in the Respondent's Brief, it would perhaps be well to correct a number of inadvertent erroneous factual statements which have somewhat misled the Respondent. The first has to do with the apartment leased by Petitioner Ina Claire Wallace in New York City. That apartment at 3 East 69th Street in New York City was leased in the fall of 1938 for a three-year period. (R. p. 160.) It was to that apartment that the Petitioner intended to return after making the picture for which

she was engaged in Los Angeles. (R. p. 125.) The apartment was completely furnished and was just ready for occupancy when the Petitioner left for Los Angeles. During the subsequent three-year period from November 1938 to November 1941, the apartment was sublet for a portion of the time. She did not, therefore, as suggested in the Respondent's Brief at page 13, "give up" her apartment in New York City after coming to Hollywood. At page 11, the Respondent remarks that Mrs. Wallace "did not renew the lease of her New York apartment". The lease of the apartment continued throughout the taxable year and for two years thereafter, so there was no occasion to "renew" it. The Petitioner intended to return to that apartment until she changed her mind upon her marriage.

At page 15 of his Brief, the Respondent states:

"The conclusion seems inescapable that only Hollywood could have been the regular place of business and statutory home of Ina Claire Wallace during the entire period from November, 1938 to September, 1939 that her contract required her presence there, since she gave up her New York activities and apartment, carried on her business and maintained her living quarters in Hollywood throughout this period, and did not go to San Francisco to live until her Hollywood employment was over."

The errors in that statement are, 1st: "Regular place of business" and "statutory home" are not synonymous terms. As pointed out in our Opening Brief, Mrs. Wallace's "regular place of business" after March 16th was San Francisco even though there-

after her place of employment for a portion of the time was in Hollywood; 2nd: Her contract did not require her presence in Hollywood, but required that she be "available" (R. p. 61); 3rd: Her "home" in San Francisco was acquired March 16, 1939 and she first resided in it from April 1st to May 1st, 1939. She was actually away from Hollywood March, ~~April~~ ^{an} ~~and May~~ and for four or five weeks commencing the first of July. (R. pp. 106, 110.) She did not give up her New York apartment. She did carry on business and maintain her home in San Francisco during this entire period and she did actually reside in her home in San Francisco and carry on business there during the months of April, July, half of September, and all of November and December. To refer to "prior Hollywood expenses" incurred before the San Francisco "home" was acquired is to misstate the fact.

On page 4 of the Respondent's Brief, it is remarked that Mrs. Wallace "remained in Hollywood until the termination of her contract with Loew's Inc." As pointed out above, that statement is incorrect. The total amount of time spent by the Petitioner Ina Claire Wallace in and about Los Angeles during the taxable year was approximately six months and the time consumed in the making of pictures was approximately three and one-half months. She was engaged to do a particular picture, and, as the studio was not able to say when the making of that picture would start, her salary was based upon her normal theatrical season's earnings and for convenience was paid over a period of thirty-four weeks, so that she would be available whenever the studio

was ready to make the picture. She also agreed to make other pictures if they met with her approval and actually did work two weeks on another picture which was not completed. (R. pp. 109, 112.)

These errors of fact seem so fundamental as to vitiate Respondent's argument.

In the following pages we will discuss that argument as it affects the various points in the Petitioners' Opening Brief.

ARGUMENT.

In the Brief heretofore filed by the Petitioners, the argument of Petitioners was divided into five parts.

I. The second of those parts was entitled as follows:

"2. THE PETITIONER INA CLAIRE WALLACE HAS A PLACE OF BUSINESS AT HER HOME AND RESIDENCE IN SAN FRANCISCO."

The Respondent makes no specific reference to that portion of the Petitioners' Brief, and we may therefore dispose of it before proceeding with the controverted points of discussion. The point being uncontroverted we assume that the Respondent is in agreement with the Petitioners' position in that respect. However, a brief restatement of that position may be proper.

It is agreed that prior to March 16th, 1939, the legal residence, domicile and "home", as that word is ordinarily used, of the Petitioner Ina Claire Wallace was New York City. It is also agreed that after March 16, 1939, the legal residence, domicile and "home" of that Petitioner was San Francisco. Of the period of nine and one-half months—from March 16, 1939 to the termination of the taxable year—Mrs. Wallace spent approximately one-half of the time in San Francisco and one-half in and about Hollywood. During the time spent in San Francisco, both Petitioners read and studied plays and discussed them with authors, received her business mail, telephone calls, telegrams and performed other business activities connected with Mrs. Wallace's business at their residence in San Francisco. The respondent remarks at page 14 of the Brief that these activities occurred *after* the termination of her employment and residence in Hollywood. There are two simple answers to that remark: First, it is not accurate as Respondent has overlooked the fact that these activities took place during the month of April which was before the making of the picture for which Mrs. Wallace was engaged; during the month of July—that is, during an hiatus in the making of the picture; as well as after the picture was completed early in September. Second: The activities obviously took place within the taxable year and commenced almost immediately after the change of Mrs. Wallace's home from New York to San Francisco.

In the Brief filed by the Respondent, quotation is made from the case of *Coburn v. Commissioner of*

Internal Revenue, 138 Fed. (2d) 763, decided against Respondent by the U. S. Circuit Court of Appeals for the Second Circuit on November 29, 1943. That quotation (Respondent's Brief, page 12) is as follows:

"The court there affirmed the principle that home for tax purposes is 'the place where the taxpayer is regularly employed *or customarily carries on business during the taxable year*'." (Italics ours.)

In our previous Brief, we quoted from a memorandum of the General Counsel of the Bureau of Internal Revenue the definition of "business", cited by him from the case of *Flint v. Stone Tracy Co.* (220 U. S. 107):

"Business is a very comprehensive term and embraces everything about which a person can be employed."

We submit that, both on the law and on the facts, the Petitioner Ina Claire Wallace customarily carried on business during the taxable year at her home in the City and County of San Francisco.

II. The first numbered portion of the Petitioners' Argument in their Opening Brief discussed the intent of the Congress in its use of the words "away from home in the pursuit of a trade or business". In that portion of the Brief, we pointed out that there was nothing in the statute to indicate that Congress intended to use the word "home" in any other

than its usual sense. Our conclusion in that respect is buttressed by the *Coburn* decision above referred to wherein that Court states as follows:

“In the ordinary meaning of the word, Mr. Coburn’s ‘home’ was in New York, not in California. The Commissioner urges that the statute uses the word in a special ‘tax sense’ which compels the opposite conclusion. But nothing in the statute bears evidence of any unusual meaning.”

The Court then remarks that a commuter’s expenses of daily travel may well be personal expenses rather than traveling expenses within the meaning of the Revenue Act, and then for the purpose of argument, “assumes” (but does not decide) that the words of the statute may be given a special tax sense. Upon that assumption, the Court states that even in such a “tax sense”, the word “home” ought to be limited to the place where the taxpayer is regularly employed or to a place where he customarily carries on business during the taxable year. The decision in the case, as distinguished from the assumption, was that Mr. Coburn’s home remained in New York whether the word was construed in the usual and customary sense or in a special “tax sense”. In other words, the Court having determined that Mr. Coburn’s “home” was in New York—however that word was construed—did not find it necessary to decide whether or not the word “home” could be used in a special tax sense. The Respondent therefore is in error in his assumption that the *Coburn* case supports the theory that Congress intended the word “home” to

be used in other than its natural, plain, ordinary and commonly understood meaning.

It is interesting to note in passing that the Circuit Court of Appeals in the *Coburn* case based its decision squarely upon the cases of *Griesemer v. Commissioner*, 10 B.T.A. 386 and *Brown v. Commissioner*, 13 B.T.A. 832, both of which cases were cited in the Petitioner's Opening Brief and which cases use the word "home" in its ordinary sense as meaning the usual place of abode.

III. In their Opening Brief, Petitioners discussed at some length the two conflicting rules laid down by the Bureau of Internal Revenue and reflected in decisions of the Tax Court of the United States and its predecessor, the Board of Tax Appeals. We referred to those rules as the *Greisemer Rule* and the *Bixler Rule*, and remarked that we saw no possibility of co-ordinating the two rules by any process known to us.

The Respondent in his Brief (p. 18) denies that there has evolved two conflicting rules and as a reply to our allegation points out that some of the cases decided under one rule sometimes refer to cases decided under the other rule. The gist of the Respondent's argument is that each of the cases was decided upon its own facts, and, therefore, there is no conflict. While the question of a conflict is perhaps not of great importance, we simply point out that in the General Counsel's Memorandum quoted in our Open-

ing Brief, a golf professional *without any established place of business* was permitted to deduct all of his living and traveling expenses while he was away from his home playing in golf tournaments and exhibitions, whereas a traveling salesman whose only home was a hotel room in Buffalo was held to have no home, and therefore was not permitted a deduction. (*Duncan v. Com.*, 17 B.T.A. 1088.) There may be some means of distinguishing the two cases, but if so we are unable to define it.

IV. Respondent's Brief is principally devoted to an attempt to distinguish the cases at bar from the case of *Coburn v. Commissioner*, supra. In its attempt, the Respondent cites the *Duncan* case, the *Priddy* case, the *Tracy* case, the *Lindsay* case—all of which were referred to in our Opening Brief and all of which follow the so-called *Bixler Rule*.

As we have remarked above, the Circuit Court of Appeals of the Second Circuit placed its decision squarely upon the Board of Tax Appeals decision in the *Griesemer* and *Brown* cases and not upon the cases cited by the Respondent. The Respondent then goes so far as to suggest the *Coburn* case as authority for its position in the cases at bar. A reference to the Brief filed by Respondent in that case indicates that every argument presented by the Respondent in this case (except only those relating to the domiciliary and community property laws of the State of California) was presented to the Circuit Court

in the *Coburn* case, and that the cases relied upon in Respondent's Brief in the case at bar were cited to the Court in the *Coburn* case in support of Respondent's similar position in that case. For the convenience of the Court, we set forth in the Appendix the Index and Citations, the Statement of the Questions Presented, and excerpts from the Argument stating the Respondent's position, all taken from his Brief in the *Coburn* case.

The fact is that the Circuit Court of Appeals in the *Coburn* case decided against the Respondent upon the authority of the *Griesemer* and *Brown* cases, which cases were decided upon a construction of the word "home" consonant with its usual and ordinary meaning. That Court decided that, while Mr. Coburn was employed in California during some 263 days of the year, nevertheless his usual place of abode and the place where he customarily carried on business (as distinguished from his place of temporary employment), was New York City. In the case at bar, the Petitioner Ina Claire Wallace had her usual place of abode at San Francisco, and there she customarily carried on her business.

In support of his position, the Respondent strains to indicate a factual difference between the *Coburn* case and the cases at bar. Let us see what parallelism there is in the facts of the two cases. Both Mr. Coburn and Mrs. Wallace were famous actors. Mr. Coburn had never before acted in motion pictures; Mrs. Wallace had done so some eight years before. Mr. Coburn had never resided in California; Mrs. Wal-

lace had resided in California for two or three years prior to 1930. Mr. Coburn made five pictures and spent 263 days in Los Angeles during the taxable year; and Mrs. Wallace made one picture and was engaged for a period of two weeks in one that was unfinished and spent not more than 180 days in Los Angeles. Mr. Coburn's earnings derived from work in the pictures were many times larger than those received from his activities connected with the legitimate stage; Mrs. Wallace's earnings were computed on the basis of her normal earnings on the legitimate stage. Mr. Coburn's activities in Hollywood were interrupted by a few weeks spent in directing a play in New York State; Mrs. Wallace's Hollywood activities were interrupted by her return to San Francisco to read plays and prepare for her appearance on the legitimate stage in the following year.

The principal difference between the facts in the *Coburn* case and those in the case at bar would seem to be that Mr. Coburn intended to and did return to the same home he had maintained for years in New York City, whereas Mrs. Wallace intended to return to her home in New York City until after March 16, 1939 (the date of her marriage) and thereafter intended to and immediately did return to her newly established home in San Francisco. Neither of the parties intended to reside in Hollywood and in neither case was their residence there of a permanent nature. The Circuit Court of Appeals for the Second Circuit has, we believe, properly stated the rule to be applied in cases of this character, by its reference to the fact that Mr. Coburn's

263 days in California “did not wrest him from New York City permanently even in a professional sense”. This statement is but another way of stating that the taxpayer should be permitted the deductions when he is away from his usual place of abode—that is, from the place where he usually resides. The word “home” connotes a permanent establishment—something more than a temporary residence taking during the period required for a temporary job. Any other construction of the statute cannot but have the effect urged in our Opening Brief of making the word “home” mean wherever a person is at that moment engaged in business, however temporary.

We submit that upon the authority of the *Coburn* case as well as upon the authority of *Griesemer v. Commissioner*, supra, and *Brown v. Commissioner*, supra, the cases upon which the *Coburn* case was based, the order of the Tax Court should be reversed.

V. The fifth portion of Petitioners' Opening Brief was entitled:

“5. THE EARNINGS OF BOTH PETITIONERS ARE COMMUNITY PROPERTY UNDER THE CONTROL AND MANAGEMENT OF THE HUSBAND: THE HOME, DOMICILE AND PLACE OF BUSINESS OF THE COMMUNITY WAS SAN FRANCISCO, CALIFORNIA.”

In answer to the authorities there cited, the Respondent states at page 19 of his Brief that the community property laws of California have no relevancy to the question at issue. In apparent support of this remarkable statement, the Respondent cites the cases of *Com-*

missioner v. Greene, 119 Fed. (2d) 383—a decision of this Court; and *United States v. Pelzer*, 312 U. S. 399. Both of these cases have to do with gift tax. They are apparently cited by Respondent in support of his proposition that the Revenue Laws are to be construed in the light of their general purpose to establish a nationwide scheme of taxation—uniform in its application. These two cases are certainly no answer to the arguments and authorities cited in the Petitioners' Opening Brief. Every married taxpayer in the State of California and every employee of the Bureau who ever had anything to do with income tax returns from California, knows that the community property laws of California very materially affect the income tax laws of the United States for the simple reason that ownership and control of earned income within the State of California is different than in the great majority of states which follow the common law and do not have the institution of community property. The Respondent does not seem to realize that under California statutes the earnings of both spouses belong equally to each at the moment the money is earned and from that moment all of that money is under the control and management of the husband. There is nothing in the statutes of California or in any of the cases to indicate that the interest of the spouses is only in "net", as distinguished from "gross", earnings or that the interests of the spouses attaches only to that portion of the income left after the taxing authorities have levied and collected taxes. The interests of the spouses, on the contrary, are, in the language of the

statute, "present, existing and equal" and attach the moment the money is earned, not at some later date.

Likewise both spouses are chargeable with debts incurred by the community. In California, the spouses are not two separate persons engaged in individual enterprises who balance their accounts at the end of the year and then have an equal interest in what remains. They are, as was suggested in our Opening Brief, joint adventurers.

In support of the same proposition, the Respondent also cited the cases of *Herder v. Helvering*, 106 F. (2d) 153 and *Stewart v. Commissioner*, 95 F. (2d) 821.

The *Herder* case arose from Texas—a state having community property laws somewhat similar to those of California. The case arose after the death of the husband and had to do with the deduction of bad debts. The point of the case seems to be that, inasmuch as the debts became worthless upon the death of the husband, they could not be charged off on the return made by his executors after his death. As bad debts can only be charged off by a taxpayer who keeps books and as the wife kept no books (either before or after the death of her husband), the Court held that the bad debts could not be charged off her return. We can find nothing in the case which supports the proposition for which Respondent apparently cites it.

The *Stewart* case is also a case arising from Texas. In that case, the husband conveyed future income to

his wife as a separate estate, and the Court very properly held that under Texas decisions, community property may be assigned as a separate estate, but it must be an existence at the time the assignment is made. Obviously community income not yet in existence cannot be assigned and therefore the assignment did not relieve the assignor from income taxes due thereon. The wife attempted to deduct all of the expenses from her income tax return rather than divide them equally between herself and her husband. In this connection, the Court stated:

“Since one-half of the community income is to be taxed to the husband, it follows that the applicable deductions should also be divided between the husband and wife. *Lucas v. Earl*, 281 U.S. 111, 50 S. Ct. 241, 74 L. Ed. 731; *Turbeville v. Commissioner*, 5 Cir., 84 F2d 307, certiorari denied 299 U. S. 581, 57 S. Ct. 46, 81 L. Ed. 428. The net result is the important thing in applying the income tax laws. Income and deductions must be accounted for on the same basis. In making separate returns, a husband and wife domiciled in Texas are each required to report one-half of the income *which simultaneously with its receipt becomes community property*. *Hopkins v. Bacon*, 282 U. S. 122, 51 S. Ct. 62, 75 L. Ed. 249.” (Italics ours.)

The case would therefore seem to be authority for the propositions advanced in the Petitioners' Brief, rather than those advanced in the Respondent's Brief.

In the concluding paragraph of his Brief, the Respondent refers to Section 24 (a) (1) of the Internal

Revenue Code and the prohibitions therein of deductions "in any case" for personal living or family expenses. That section applies to deductions of living expenses at the usual place of abode, and there is in this action no suggestion of any such deductions. The deductions contended for in this case are specifically permitted under Section 23 (a) (1), which section is quoted in both the Respondent's and the Petitioners' Briefs heretofore filed. The use of the words "in any case" in quotation marks in an endeavor to impress those words upon the Court, is obviously inaccurate in view of the clear wording of Section 23 (a) (1).

CONCLUSION.

The fundamental question to be determined in all income tax cases where deductions are claimed is whether or not the taxpayer is attempting to escape taxation upon net income. As stated by Circuit Judge Holmes in the *Stewart* case, *supra*,

"The net result is the important thing in applying the income tax laws."

Professor Griswold states it in the following language:

"The fundamental fact is that Congress has given every indication that what it intends to tax is net income; and a construction which leads in substance to a tax on gross income is just as inconsistent with the statute as one which allows the taxpayer to receive income free from tax."

Appendix, Opening Brief.

In the case at bar, the taxpayer Ina Claire Wallace maintained her home and her residence and her usual place of business, with the expense connected therewith, in the City of New York until March 16th, 1939, and thereafter both Petitioners maintained their home, their residence and their place of business, with the expense connected therewith, in the City of San Francisco. The expenses for which deductions were claimed in the income tax returns of Petitioners were incurred in addition to the normal expense of the maintenance of the Petitioners' usual place of abode. They were a proper and necessary charge against gross income. Petitioners reported and paid taxes upon their full and complete net income.

We respectfully submit that the decision of the Tax Court was erroneous and should be reversed.

Dated, San Francisco,
January 24, 1944.

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(Appendix Follows.)

Appendix

EXCERPTS FROM BRIEF FOR RESPONDENT COMMISSIONER. COBURN v. COMMISSIONER.

No. 18

*In the United States Circuit Court of Appeals
for the Second Circuit*

Charles D. Coburn,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent.

On Petition for Review of the Decision of
the United States Board of Tax Appeals.

BRIEF FOR THE RESPONDENT.

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QUESTIONS PRESENTED.

1. Whether the taxpayer is entitled, under the provisions of Section 23 (a) (1) of the Revenue Act of 1938, to deduct as ordinary and necessary business expenses for the taxable year 1938 the amounts he expended for meals, lodging and living expenses during that year while he was in California for the purpose of acting in certain motion pictures, even though he maintained a residence elsewhere.

2. Whether the taxpayer is entitled, under Section 23 (1) of that Act, to a deduction for depreciation on his personally-owned automobile used as a means of conveyance between his residence and the motion picture studios.

The Board, affirming the Commissioner's determination, held substantially that determinative of whether the taxpayer is entitled to the deductions claimed under this issue is the statutory meaning of the word "home" in Section 23 (a) (1) of the Revenue Act of 1938 (Appendix, *infra*); that the taxpayer could not maintain his place of residence at a point where he was not engaged in carrying out his trade or business and deduct his living expenses while away from such residence; that the facts conclusively establish that the taxpayer was engaged in carrying on the trade or business of motion picture actor throughout the year 1938 at Los Angeles, California, which required his presence there while so acting; and that therefore the claimed deduction repre-

sented, not a business expense but, personal expenses which are not deductible. (R. 17-18.) We submit that the Board was correct in so holding and, therefore, its decision should be affirmed by this Court.

The foregoing is true for the reason that the term "home" as used in Section 23 (a) (1) of the statute, as interpreted by Article 23 (a)-1 of the pertinent Regulations, is to be distinguished from domicile. The former has been construed for tax purposes to mean the taxpayer's principal place of business, post of duty or place of employment where his presence is required while earning his livelihood, as the Board stated. (R. 17, 18.) Such statutory "home", therefore, could not be in some other place where he merely maintains an apartment or other residence without reference to the location of or carrying on his trade or business. *Duncan v. Commissioner*, 17 B. T. A. 1088, affirmed *per curiam*, 47 F. 2d 1082 (C. C. A. 2d) (where the taxpayer, a traveling salesman, maintained no permanent home but traveled on a roving commission with headquarters wherever he happened to be, and it was held that he was not entitled to deduct the year's expenses for meals, lodging, etc.); *Lindsay v. Commissioner*, 34 B. T. A. 840 (where the hotel expenses incurred by a member of Congress while attending Congressional sessions in Washington and his railroad fares to and from Brooklyn, New York, where he maintained a residence, to confer with his constituents, were held not

to be deductible because Washington, the seat of the Government, was his home within the meaning of the statute and Regulations for tax purposes); *Bixler v. Commissioner*, 5 B. T. A. 1181; *Peters v. Commissioner*, 19 B. T. A. 901; *Tracy v. Commissioner*, 39 B. T. A. 578 (where the taxpayer, a motion picture actor, unsuccessfully sought to deduct the cost of meals and lodging while in California in pursuit of his vocation or business as a professional actor, even though he maintained another residence in Pennsylvania); *Priddy v. Commissioner*, 43 B. T. A. 18, petition for review dismissed July 23, 1941 (C. C. A. 5th); I. T. 3314, 1939-2 Cum. Bull. 152.

In determining the amount of allowable deductions for expenses for meals and lodging, the "home" contemplated by the statute and Regulations is that maintained by a taxpayer for the purpose of carrying on the business in connection with which the deduction for the expenses is claimed. O. D. 1021, 5 Cum. Bull. 174 (1921); O. D. 905, 4 Cum. Bull. 212 (1921). In the present case, therefore, the taxpayer's statutory home was that maintained in Los Angeles where his income-producing business is located. Consequently, his living and related expenses incurred in that city where he kept his residence in connection with the pursuit of his vocation or business were, regardless of the maintenance of another apartment in New York City unrelated to his business, personal, living or family expenses which are not deductible in computing income. Section 24 (a) (1), Revenue Act of 1938; Article 24-1, Treasury Regulations 101; I. T. 1355, I-1 Cum. Bull. 194 (1922).

